Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HELEN BYBEE,
Petitioner,

v.

PROCTOR COMMUNITY HOSPITAL, n/k/a PROCTOR HOSPITAL,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Circuit Courts of Appeals are applying the holding of the U.S. Supreme Court in *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (1993), in an inconsistent manner requiring various standards of evidence and thereby producing a conflict among the circuits requiring resolution and clarification by this Court?

2. Whether the decision of *St. Mary's Honor Center v. Hicks* by the U.S. Supreme Court requires the Plaintiff to submit direct evidence in order to prevail so as to satisfy a standard described by the phrase "pretext-plus"?

3. Whether the decision of *St. Mary's Honor Center v. Hicks* eliminates the indirect method of proof a plaintiff could use to prevail on a discrimination claim pursuant to Title VII as previously approved by the U.S. Supreme Court in the cases of *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and ADEA as acknowledged in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985)?

4. Whether the U.S. District Court of the Central District of Illinois erred as a matter of law when it required the Plaintiff to prove age discrimination by submitting direct evidence based on its interpretation of *St. Mary's Honor Center v. Hicks*?

5. Whether the Seventh Circuit U.S. Court of Appeals erred as a matter of law when it disagreed with the U.S. District Court and held that there were facts proven by both parties to support the ultimate claims of the Plaintiff and Defendant but affirmed the facts as found by the U.S. District Court?

6. Whether the U.S. Court of Appeals can use the "business judgment" rule in a manner that allows ruling in favor of a Defendant employer where the alleged business judgment stated by the Defendant employer was never put into effect or actually occurred?

7. Whether the U.S. Supreme Court in the case of *St. Mary's Honor Center v. Hicks* set forth a standard of proof and placed evidentiary burdens of proof on the Plaintiff employee which are greater than the standard for proving a willful violation of the Age Discrimination in Employment Act as set forth by this Court in *Hazen Paper Co. v. Biggins*, ___ U.S. ___, 113 S.Ct. 1701 (1993) and greater than the burden of proof standard for proving sexual harassment detailed in *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367 (1993)?

8. Whether Plaintiff's evidence that the Defendant's proffered reason for the involuntary transfer and resulting constructive discharge of Plaintiff was contradicted by documentary evidence from the same Defendant, at the time the decision occurred, constitutes direct evidence that age was a determining factor or otherwise proved Defendant's actions constituted a pretext for age discrimination?

LIST OF PARTIES

The parties to the proceeding before this Court are:

Petitioner:

HELEN BYBEE

Respondent:

PROCTOR COMMUNITY HOSPITAL, n/k/a PROCTOR HOSPITAL

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A. After this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S.Ct. 2742 (1993), the courts of appeals are sharply divided over whether evidence establishing both a *prima facie* case of intentional discrimination and the falseness of an employer's proffered explanation is, without more, insufficient as a matter of law to prove intentional discrimination..... 16

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Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

The Petitioner, HELEN BYBEE, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on June 3, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit was an unpublished order not to be cited per Circuit Rule 53. A copy of the slip opinion received by Petitioner is reprinted in the Appendix at A-8, *infra.*

The decision and opinion of the United States District Court for the Central District of Illinois has not been reported but is reprinted in the Appendix at A-1, *infra.*

JURISDICTION

This cause arose under 29 *United States Code* 621, *et seq.* and specifically alleged violations of 29 *United States Code* 623. The

United States District Court for the Central District of Illinois had jurisdiction under 29 *United States Code 626* and 28 *United States Code* 1331. On November 24, 1993, the U.S. Magistrate Judge filed findings of fact, conclusions of law, and order for judgment favoring Defendant. On November 29, 1993, the U.S. District Court for the Central District of Illinois entered a decision by the Court and ordered and adjudged that judgment was entered in favor of the Defendant and against the Plaintiff, plus costs.

From the judgment in favor of Defendant, plus costs, Plaintiff appealed to the Court of Appeals for the Seventh Circuit. The Court of Appeals for the Seventh Circuit had jurisdiction of this cause under 28 *United States Code* 1291. The Seventh Circuit affirmed the judgment entered by the District Court.

This Court has jurisdiction to review this case under 28 *United States Code* 1254.

STATUTES INVOLVED

29 *United States Code* 621:

> (a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) The existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 *United States Code* 623(a):

(a) Employer Practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

42 *United States Code* 2000e(m):

For purposes of this subchapter—

(m) The term "demonstrates" means meets the burdens of production and persuasion.

42 *United States Code* 2000e-2(k)(2), and (m):

(k) Disparate impact as basis of practice

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

. . . .

(m) Motivations for practice

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT OF CASE

Petitioner was employed by Respondent from February 5, 1973, until November of 1988 as a licensed practical nurse (LPN). Petitioner's date of birth is September 19, 1930. Her employment with Respondent ended on November 1, 1988. At all times up to immediately before Petitioner's employment with Respondent ended, she performed her job in an acceptable fashion in accordance with her employer's legitimate expectations. Shortly before Petitioner's employment with Respondent ended, she was directed to move from the first (day) shift job which she had worked for ten years to the third (night) shift on the same unit or floor of Respondent. (Stipulation of Uncontested Facts and Issues of Law attached to Final Pre-trial Order, read into the record by the Court, Transcript Vol. 1, 10/7/92, pp.117-20)

Petitioner was hired as an LPN by Respondent after she graduated from nursing school in the early 1970s. (Transcript Vol. 2, 10/8/92, pp.328-29) She first started working for Respondent on third shift on floor 4-Northeast, but worked occasionally in all other areas of the hospital except for the emergency room. (*Id.* at 329) She soon moved into a third-shift opening on 4-Southwest, where she performed her LPN duties for 6-1/2 years. (*Id.*) She then learned that a first shift position was available on 4-Southwest. Petitioner spoke to the head nurse, Sharon Draper, and recalled Ms. Draper saying, "Well, I guess you will have to be able to take it because you have more seniority on the floor." (*Id.* at 330)

From 1974 through 1988, Petitioner remained employed in the same first-shift position in the hospital area first known as 4-Southwest and later known as 4-C. (*Id.* at 330) After the 4-Southwest floor was split into two sections, 4-S and 4-C, Petitioner was the only LPN Respondent employed on 4-C. (*Id.* at 331) In the evaluations she received, there were always comments stating that Petitioner was an asset to the Respondent hospital. (*Id.* at 331)

As Petitioner performed her LPN duties on 4-C during 1988, she did not notice any substantial change in admissions. (*Id.* at 332) According to Petitioner, the process called "A.M. Admissions" involved patients being admitted to Respondent's facilities early in the morning for surgery on the same day. The A.M. Admissions

procedure had been in place for several years when Petitioner's employment with Respondent terminated. (*Id.*) Petitioner assisted with the process of admitting A.M. Admissions patients who came in at 7 or 8 a.m. for surgery scheduled at 10 or 11 a.m. Petitioner would take the patient's blood pressure, temperature and medical history. Since she was an LPN, Petitioner was not allowed to perform the physical assessment which only a registered nurse, or RN, could perform. (*Id.* at 333)

Petitioner's job duties did not change when Carol Roper, LPN, was transferred to Petitioner's unit or floor to also work first shift and Amy Mauschbaugh, RN, transferred from 4-C to 4-S. (*Id.* at 334) The Roper-Mauschbaugh transfer occurred in May 1988.

Then, in November 1988 Patient Care Coordinator (PCC) Susan Gulley called a meeting attended by Petitioner and other LPNs, including Carol Roper, Mary Persak, and possibly Dorothy Hipp. As the immediate supervisor, PCC Gulley requested volunteers to work on third shift. No one offered to take the position. (*Id.* at 335) Petitioner stated she did not think she should have to go to third shift because she had floor seniority, and this was how she had previously moved to the day shift. (*Id.* at 336-37) After the meeting, PCC Gulley informed Petitioner that it was decided she would go to third shift. Petitioner responded that working on third shift was impossible for her because her son, who had been severely injured in an automobile accident and was in a semi-comatose condition, needed her care at home. (*Id.*) Petitioner offered to work part-time, work primarily second shift and weekends, and generally do anything necessary to continue performing her duties on the day shift. PCC Gulley replied, "At your rate you have no options. You will go on third shift." (*Id.* at 344)

The care Petitioner provided for her son included cleaning his feeding tubes, taking care of his wounds, suctioning his trach, and waking up every two hours at night to turn him so he would not get bed sores, performing physical therapy on him, and teaching him how to use an alphabet board so he could communicate. (*Id.* at 339-40) Petitioner had discussed her son's medical condition with PCC Gulley. (*Id.* at 341)

During November 1988, Petitioner was scheduled to work third shift. She called to inform Respondent's personnel supervisor that

she could not find anyone to stay with her injured son, and could not work at night. (*Id.* at 346-47) Petitioner informed Respondent's personnel supervisor that she would have to retire, because she could not and would not leave her injured son alone with her husband. Petitioner's husband had hearing problems which prevented him from hearing his son's requests for help. (*Id.* at 347)

Petitioner used Respondent's internal grievance procedure and filed her first written grievance with the Vice President of Personnel, Mike Franks. (*Id.* at p.344) She never received a response from Respondent's department head, the President of Nursing Services Janice McCoy, PCC Susan Gulley, or Vice President of Personnel Mike Franks, as Step 2 of the grievance procedure required. Furthermore, the required meeting or conference imposed by Step 2 of the grievance procedure never occurred. (*Id.* at 345; *see also* Plaintiff's Exhibit 1, the Employee Handbook of Proctor Community Hospital, pp.41-42, received in evidence, Item #66, Transcript Vol. 2, 10/8/92, p.355) Petitioner then filed a second grievance by addressing a letter to Respondent's President and CEO, Norman Laconte. Petitioner wrote that she was being forced to take early retirement and that the older employees, including Petitioner, were being treated badly. (Plaintiff's Exhibit 12, pp.5-7, 11/88 written grievance; *see also*, Transcript Vol. 2, 10/8/92, p.355) She then received a phone call from Mr. Franks, who did not offer Petitioner any alternative jobs at Respondent's facility. (*Id.* at pp.345-46) Neither President and CEO Laconte nor his designated assistant Chief Operating Officer McGowan investigated Petitioner's grievance, complaining of age discrimination, as required by the grievance procedure. Though the grievance procedure demands a written decision, Petitioner never received a written decision on her grievance. (*Id.* at pp.344-46) *see also*, Plaintiff's Exhibit 1, the Employee Handbook of Proctor Community Hospital, Step 3, p.42)

In December 1988, Petitioner met with Mr. Franks. She told Mr. Franks that she thought it was "terrible" that Respondent was getting rid of people because they were getting older. She also testified that she involuntarily signed the retirement papers. (*Id.* at 347-49) Petitioner emphasized she did not want to quit and stressed that she loved her job as an LPN with Respondent. (*Id.* at 349)

CEO Laconte possessed the responsibility for approving all policies, including seniority policies affecting Respondent's employees. (Item #65, Transcript Vol. 1, 10/7/92, pp.22-23) Mr. Laconte testified that there was no formal seniority policy covering nursing staff, and that he was not aware of any seniority policy covering nursing staff outside the areas of pension benefits, vacation benefits, and sick pay. (*Id.* at p.23) He further stated that Respondent had no official hospital-wide seniority system policy. He also affirmed that he did not know anything about the use of a hospital-wide seniority policy, and denied ever approving a hospital-wide seniority policy. (*Id.* at 27-28) Mr. Laconte further denied having anything to do with Petitioner's grievance, and stated his belief that when her grievance was submitted to him, he directed it to Mr. McGowan. (*Id.* at 28-29)

Mr. McGowan testified as to his awareness that Petitioner did not want to work third shift because she wanted to be home with her son who had suffered injuries from an auto accident. (*Id.* at 48) Mr. McGowan could not recall Mr. Laconte referring to Petitioner's third step grievance. He affirmed that he had never heard the term hospital seniority used in any situation other than Petitioner's case and declared that hospital-wide seniority was first used in determining who was moved in Petitioner's case. (*Id.* at 41,47)

Mr. Franks stated that Proctor Hospital did not have a seniority policy when PCC Gulley discussed her staffing proposal with him. He further stated that Director of Nursing McCoy and PCC Gulley decided to apply hospital-wide seniority in Petitioner's case and he agreed with their reasoning involving a proposal for a staffing mix change. (*Id.* at 72-75) Mr. Franks admitted that the hospital-wide seniority policy applied to Petitioner was never transformed into a written policy. Furthermore, he conceded that the hospital-wide seniority policy was never taken to CEO Laconte or Chief Operating Officer McGowan for their approval. Mr. Franks also admitted that he did not know whether the proposed third shift LPN position Petitioner did not take was ever filled. In addition, he did not remember whether Director of Nursing McCoy or PCC Gulley ever requested that he post a third shift LPN position in order to place or hire a new or different LPN on third shift on 4-C or 4-S. (*Id.* at 78-79) Mr. Franks was aware of Petitioner's concerns for providing

care for her son. He recalled Petitioner stating that the need to provide caregiving to her son prevented her from working third shift. (*Id.* at 88-89)

Mr. Franks confirmed that he did not give Petitioner the options listed in a memorandum he authored. Therefore, he did not offer Petitioner the choice of being placed on short term leave to wait for an opening. Mr. Franks also refused to consider Petitioner as a replacement for an upcoming leave of absence. (*Id.* at 83-85 and Plaintiff's Exhibit 12, p.1, received in evidence, Item #66, Transcript Vol. 2, 10/8/92, p.355) Finally, Mr. Franks admitted that after reading the last two paragraphs of Petitioner's Step 2 grievance letter, he perceived that Petitioner had a compelling desire to stay employed by Respondent and was hurt that she was in a position that would prevent her from working anymore for Respondent. (*Id.* at 117 and Plaintiff's Exhibit 12, p.2)

Vice President of Nursing Services Ms. McCoy testified that the applicable seniority policy applied to conflicts over transfers from one nursing unit to another nursing unit was "nursing-wide seniority." Ms. McCoy explained that the use of nursing-wide seniority meant that Respondent never compared the employment years of nursing staff personnel to anyone outside the nursing department. (Joint Exhibit 1, Deposition of Janice McCoy, 9/14/92, pp.73-74)

Assistant Director of Nursing Ms. Davis stated her understanding that PCC Gulley's staffing proposal required moving a full-time LPN to third shift in December, 1988. Ms. Davis confirmed that according to hospital schedules from 1988 forward, the documents and schedules indicated there was no full-time LPN on third shift in the department headed by PCC Gulley. (Item #65, Transcript Vol. 1, 10/7/92, pp.151-54) Ms. Davis testified that she did not believe PCC Gulley showed her any numbers concerning A.M. Admissions when discussing the proposal PCC Gulley thought had to be implemented in November or December of 1988. While Ms. Davis recalled possibly discussing the staffing proposal with PCC Gulley, she did not recall seeing anything on the staffing proposal. (*Id.* at 167-68)

PCC Gulley testified that Petitioner was distressed when having to leave her employment and agreed that Petitioner did not willingly give up her job. (Item #66, Transcript Vol. 2, 10/8/92, p.257) PCC

Gulley affirmed that she authored a proposal to institute changes on 4-C, where Petitioner worked, in October of 1988. (*Id.* at 238-39) The staffing proposal required moving an LPN from the first shift to the third shift and moving an RN from the third shift to the first shift. The same proposal indicated the primary increase in nursing staff would occur on second shift where the proposed increase of "full-time equivalents" rose from 5.1 to 7 whereas on third shift the increase was from 4.5 to 5.1. PCC Gulley gave as reasons for the proposed change the A.M. Admissions of patients, the night shift taking on more responsibility and requiring more persons on third shift, the need to re-enforce third shift and balance the staffing mix. (*Id.* at 241-46 and Plaintiff's Exhibit 136, received in evidence, p.359) PCC Gulley stated that she required Petitioner to work third shift and declared that there was no other opening for Petitioner. She also never offered Petitioner a part-time position on second shift. (*Id.* at 253-54)

While PCC Gulley testified that there was an increase in the patient A.M. Admissions numbers, she admitted that she never provided anyone with any numbers showing an increase in A.M. Admissions. At the time of trial, Ms. Gulley still did not know any actual numbers indicating an increase in A.M. Admissions. (*Id.* at 291) Following the termination of Petitioner's employment, PCC Gulley conceded that she never filled the proposed full-time third shift LPN slot with a full-time LPN. (*Id.* at 250-52)

Carol Roper was the LPN permitted to transfer in May 1988 from 4-S to a first shift position on 4-C where Petitioner worked. Ms. Roper was under 40 years of age at the time of the May 1988 transfer and was still under 40 years of age when Petitioner's employment was terminated in November, 1988. (*Id.* at 208) Ms. Roper had less unit seniority and less nursing seniority as an LPN than Petitioner in 1988. (*Id.* at 208-09) Ms. Roper also explained that during situations involving her prior transfers, the rule applied to resolve conflicting shift requests was the rule based on in-house seniority. (*Id.* at 208-18)

At the time of the May 1988 transfer, Ms. Mauschbaugh was moved from 4-C to 4-S when Ms. Roper transferred to 4-C. Ms. Mauschbaugh testified that PCC Gulley told her that she had to transfer because she had the "least seniority" on the unit. (*Id.* at 206-08)

Finally, Shirley Suits, a former PCC or nurse manager with Respondent, also testified at trial. Ms. Suits date of birth is June 22, 1938. (*Id.* at 299) Ms. Suits was employed by Respondent from 1961 until March 1988. (*Id.* at 300) From 1979 until March 1988, Ms. Suits worked as a nurse manager. (*Id.* at 303) When she was terminated from her PCC position, Ms. Suits testified that PCC Gulley told her she did not want her to work as a staff nurse on her unit. Ms. Suits testified that Ms. Gulley said she did not want Ms. Suits to use her as a "crutch." Ms. Suits understood the statement by PCC Gulley to refer to Ms. Suits' age since only the disabled or elderly require the use of a crutch. Since Ms. Suits did not have any disability and had 65 accumulated sick days when her employment terminated and had not missed work, Ms. Suits stated that Ms. Gulley must have referred to Ms. Suits' age when using the term "crutch." (*Id.* at 309-10)

The uncontradicted or unrebutted evidence established the following: 1) In 1988, the decision-maker, PCC Gulley, made a statement to another older worker, Shirley Suits, which showed her animus against older employees; 2) The purported business judgment proposal of PCC Suits, allegedly requiring the involuntary transfer of Plaintiff, was never put into effect by actually placing an LPN on third shift on Plaintiff's former floor; 3) Even according to PCC Gulley's supposed proposal, the greatest increase in nursing staff would occur on second shift; and 4) Plaintiff's employment was involuntarily terminated and Respondent's adverse employment actions resulted in Petitioner's forced departure from her LPN position with Respondent.

Some of the findings of fact which the U.S. District Court made after a two-day bench trial included the following:

> "Plaintiff, Helen Bybee, had the least amount of overall seniority, and thus was selected for the compelled change of shift. She refused to transfer and elected to retire.
>
> I find that no evidence was offered on behalf of the Plaintiff to substantiate her claim of age discrimination. Her case is based on her perception without proof.

> I find that the Defendant Hospital has shown by credible evidence that the transfer of Plaintiff was based on sound reasons and was not a pretext."

(Paragraphs 23-26, p.4, Findings of Fact, Conclusions of Law and Order for Judgment filed November 24, 1993.)

The District Court also stated the following conclusion of law:

> "In order to prevail on her claim, Plaintiff bears the burden of proof that she was discriminated against on account of her age. *St. Mary's Honor Center v. Melvin Hicks*, ___ [U.S.] ___ [,] 113 S.Ct. 2742 (1993). The Plaintiff has only presented evidence that she perceived that the employer's actions were prompted by her age, but she has no proof."

(*Id.* at p.4)

Based on the District Court's perception of a failure in proof, it entered judgment in favor of the Respondent and against Petitioner.

On appeal, the Seventh Circuit Court of Appeals affirmed. In its opinion, the Court acknowledged that the Plaintiff was attempting to prove intentional employment discrimination and had available either the direct method of proof or the indirect method. *Bybee v. Proctor Community Hosp.*, No. 93-3932, slip op. at 4 (7th Cir. June 3, 1994). The Seventh Circuit held that the Plaintiff was not prevented from using the indirect method of proof. (*Id.* at 5) While the Seventh Circuit disagreed with the District Court by stating that there was evidence submitted by both parties on the ultimate issue of whether age was a determining factor in the involuntary transfer of Petitioner, the Seventh Circuit affirmed the factual findings by the District Court. The Court also rejected Petitioner's argument that the District Court erred as a matter of law by formulating and applying incorrect evidentiary standards which prevented proving age discrimination by submitting indirect evidence. The Court further stated that Respondent could adopt any type of seniority system it wanted as long as it was not a pretext disguising a discriminatory motive. Finally, the Seventh Circuit did not reach a definite and firm conviction that a mistake had been committed by the District Court with respect to its factual findings. (*Id.* at 4-7)

REASONS FOR GRANTING THE WRIT

Introduction

The courts of appeals are in conflict regarding the means by which plaintiffs may, after *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S.Ct. 2742 (1993), establish discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, or Title VII, 42 U.S.C. 2000e *et seq.* Since this Court's 1973 decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), once a plaintiff has established a *prima facie* case of unlawful discrimination, the employer must produce a "legitimate, nondiscriminatory reason" for its allegedly discriminatory action. If this burden of production is met, the plaintiff may establish that the employer's proffered reason is a pretext for unlawful discrimination. The ultimate burden of persuading the fact-finder that the employer unlawfully discriminated remains at all times with the plaintiff. *Hicks*, 509 U.S. at ___, 113 S.Ct. at 2747. This method of proof is properly applied to both ADEA and Title VII claims. *E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107 (1988); *Oscar Meyer & Co. v. Evans*, 441 U.S. 750 (1979).

It has been widely noted that "[p]rior to the Supreme Court's . . . decision in *St. Mary's Honor Center v. Hicks*, confusion reigned among the circuit courts as to whether the plaintiff could prove employment discrimination simply by showing that the defendant's reasons were not credible." *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 957 (5th Cir. 1993) (citation omitted). *See also, Hicks*, 509 U.S. at ___, 113 S.Ct. at 2750. But despite this Court's assurance in *Hicks* that "[p]anic will certainly not break out among the courts of appeals," 509 U.S. at ___, 113 S.Ct. at 2750, the decision has fueled new inter-circuit conflicts regarding ADEA and Title VII plaintiffs' burdens of proof. *See, e.g., Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 142 (2nd Cir. 1993). Indeed, a growing "ill-founded confusion . . . has surrounded *Hicks*' pronouncements." *Id.*

Although *Hicks* explicitly stated that "rejection of the defendant's proffered reasons [as pretext] will *permit* the trier of fact to infer the ultimate fact of intentional discrimination," 509 U.S. at ___, 113 S.Ct. at 2749, because "no additional proof of discrimination is

required," *id.* (internal quotation marks and brackets omitted), decisions in several circuits have focused on contrary language in the opinion, citing *Hicks* to support the proposition that discrimination plaintiffs who have proved that the employer's proffered reasons are pretextual must nonetheless fail unless they are able to set forth direct evidence proving discrimination. Furthermore, *Hicks* has been interpreted by the circuit courts to support the exclusion of evidence used to establish a *prima facie* case when considering whether or not an employer has discriminated, and to justify an abandonment of the standards for scrutiny of an employer's proffered reason established in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978).

This petition requests Supreme Court review of these controversial interpretations of *Hicks*, each fundamental to the Seventh Circuit's holding in this case. As shown in these Reasons for Granting the Writ, in its attempt to reconcile apparently conflicting authority the Seventh Circuit has joined other circuits which have misinterpreted and misapplied *Hicks* and this Court's other guidance on the accepted methods of proving intentional discriminatory treatment.

I. The Seventh Circuit's exclusion of the evidence set forth by the Petitioner to establish a *prima facie* case of intentional discrimination is the result of a common misreading of *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S.Ct. 2742 (1993).

A. The courts of appeals are in conflict as to whether evidence presented to establish a *prima facie* case of discrimination retains its probative value after a defendant has met its burden of production in the burden-shifting formula established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

With its decision in the case below, the Seventh Circuit has joined courts in the Sixth and Eighth Circuits that have failed to heed this Court's instructions in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S.Ct. 2742 (1993), regarding the continuing probative value of evidence initially presented by an ADEA or Title VII plaintiff to establish a *prima facie* case of intentional discrimination.

In *Burdine*, this Court determined that "there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's exp[la]nation." 450 U.S. at 256 n.10. *Accord Wallis v. J.R. Simplot Co.*, ___ F.3d ___, ___, 64 Fair Empl. Prac. Cas. (BNA) 1507, 1510 (9th Cir. 1994); *Gallo v. Prudential Services*, 22 F.3d 1219, 1226 (2d Cir. 1994). *Hicks* confirmed that along with a showing of pretext "the elements of the *prima facie* case [may further] suffice to show intentional discrimination." 509 U.S. at ___, 113 S.Ct. at 2749. *See also Cabrera v. Jakabovitz*, 24 F.3d 372, 385 (2d Cir. 1994) (dismissing contention that "evidence beyond that presented in the plaintiff's *prima facie* case" is required to establish liability as a "misread[ing]" of *Hicks*). The evidence presented to establish the elements of a *prima facie* case should, in other words, be accorded the same consideration as is evidence generally, because "reviewing courts should [neither] treat discrimination differently from other ultimate questions of fact[, n]or should they make their inquiry even more difficult by applying legal rules which were devised to govern the basic allocation of burdens and the order of presentation of proof." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (internal quotation marks and citation omitted).

To the contrary, the Court of Appeals for the Sixth Circuit has held that "*McDonnell Douglas* and *Burdine* indicate that proof of replacement outside the protected class is merely a prerequisite to the establishment of a *prima facie* case of employment discrimination. Such proof does nothing to establish pretext." *Barnhart v. Pickerel, Schaeffer*, 12 F.3d 1382, 1395 (1993). The Eighth Circuit applied the same reasoning in *Adams v. West Publishing Co.*, 25 F.3d 635, 636 (1994), holding that "[the plaintiff] raised a prima facie case of discrimination but failed to show *any* evidence of pretext for intentional discrimination" (emphasis supplied). In the case below the Seventh Circuit also adopted this incorrect rule of evidence, as applied by the district court. *See* Part B, *infra*. Such a mistake is "substantive error." *Burdine*, 450 U.S. at 259.

B. The evidence presented by the Petitioner to establish a *prima facie* case of unlawful age discrimination was erroneously excluded when the district court determined that the Petitioner had not established that the Respondent's proffered explanation was pretextual.

Reasoning similar to that of the Sixth and Eighth Circuits and contrary to this Court's precedent is reflected in the findings of the district court in the present case. While all parties agree that the Petitioner established a "clear . . . *prima facie* case of discrimination," *Bybee v. Proctor Community Hosp.*, No. 93-3932, slip. op. at 5 (7th Cir. June 3, 1994), the district court nonetheless found that "*no evidence* was offered on behalf of the plaintiff to substantiate her claim of age discrimination." *Bybee v. Proctor Community Hosp.*, No. 91-2256, slip. op. at 4 (C.D. Ill. Nov. 24, 1993) (emphasis supplied). In its conclusions of law, the district court reiterated its finding that the record was completely devoid of any evidence which could support a finding of pretext and cited only *Hicks*, thereby relying upon that decision to support its exclusion of at least the evidence which formed the Petitioner's *prima facie* case. *See id.*

On appeal, the Court of Appeals for the Seventh Circuit cited the district court's finding of "no evidence." *Bybee* at 3. The court of appeals nevertheless found, contrary to the district court and without explanation, that "[the Petitioner] points to some evidence that supports [a finding of pretext]," *id.* at 6, "[i]t is clear that both sides had some support in the record," *id.* at 6, and "[i]n this case, there was evidence on both sides of the issue," *id.* at 7. Although the Seventh Circuit stated that "[t]here is no credible suggestion . . . that the [district] court employed the wrong legal standard," *id.* at 5, it made no attempt to explain how the district court could have concluded that the Petitioner had advanced "no evidence" to support a finding of pretext unless it had excluded at least the evidence which established her *prima facie* case.

The court of appeals nevertheless affirmed, finding that the lower court's findings of fact were not "clearly erroneous." Citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985), the court of appeals concluded that "[t]his standard does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced

that it would have decided the case differently." *Bybee* at 6. In *Anderson*, however, the findings of fact in question were determined after the district court had evaluated all of the evidence. 470 U.S. at 568. *Anderson* therefore held that deference is appropriate "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety." *Id.* at 573-74. The evidentiary standard applied in determining findings of fact is a question of law, and is therefore properly reviewed *de novo*. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).

The district court's finding of "no evidence" is not "plausible in light of the record," *Anderson* at 574, because it failed to consider at least the evidence which established the Petitioner's *prima facie* case. The court of appeals should therefore have followed the example of *Aikens*, not *Anderson*. In *Aikens*, the Court of Appeals for the District of Columbia Circuit affirmed the district court's factual determinations against a plaintiff alleging unlawful discrimination. 460 U.S. 711, 717. That judgment was vacated by this Court, and the cause was remanded to the district court for reconsideration of the record, because the district court had, as here, excluded relevant evidence. *Id.* This Court held that "we cannot be certain that its findings of fact in favor of the [defendant] were not influenced by its mistaken view of the law." *Id.*

II. With its opinion in the case below, the Seventh Circuit has joined other circuits that misunderstand and are in disagreement over the methods of proof and the type of evidence required to prove a plaintiff's claims of unlawful, intentional discrimination after *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S.Ct. 2742 (1993).

A. After this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S.Ct. 2742 (1993), the courts of appeals are sharply divided over whether evidence establishing both a *prima facie* case of intentional discrimination and the falseness of an employer's proffered explanation is, without more, insufficient as a matter of law to prove intentional discrimination.

In *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S.Ct. 2742 (1993), this Court held that "rejection of the defendant's proffered

reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination," 509 U.S. at ___, 113 S.Ct. at 2749, because "no additional proof of discrimination is *required*." *Id.* (internal brackets and quotation marks omitted). Contrary language in the opinion, however, has been read to endorse a different standard, under which plaintiffs who have introduced evidence both establishing a *prima facie* case of intentional discrimination and proving an employer's proffered explanation to be false are nevertheless unable as a matter of law to avoid summary judgment for the employer unless some separate, additional evidence of discriminatory animus is set forth. This approach has come to be known as the "pretext-plus" rule. *See, e.g., Robinson v. PPG Industries*, 23 F.3d 1159, 1163 (7th Cir. 1994) (explaining and disavowing prior "flirt[ation]" with "pretext-plus" approach); *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1247 (D.C. Cir. 1984) (Scalia, J., dissenting) (refusing to consider unexplained discriminatory treatment as "circumstantial evidence of racial animus"); Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 Hastings L.J. 57 (1991) (explaining and criticizing the "pretext-plus" approach). The "pretext-plus" language in the *Hicks* opinion includes statements that a discrimination plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason," 509 U.S. at ___, 113 S.Ct. 2752, and that "proving the employer's reason false becomes part of (and often considerably *assists*) the *greater* enterprise of proving that the real reason was intentional discrimination." *Id.* at ___, 113 S.Ct. at 2752 (emphasis supplied). Although *Hicks* instructs that "[t]he factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the *prima facie* case, suffice to show intentional discrimination," *id.* at ___, 113 S.Ct. at 2749, the opinion elsewhere states that "[i]t is not enough . . . to *dis*believe the employer." *Id.* at ___, 113 S.Ct. at 2754.

The *Hicks* dissent correctly predicted both the lesson that lower courts would learn from this "pretext-plus" language, and the unfortunate result for plaintiffs alleging discrimination. "This 'pretext-plus' approach . . . [will] result in summary judgment for the

employer in the many cases where the plaintiff has no evidence beyond that required to prove a *prima facie* case and to show that the employer's articulated reasons are unworthy of credence." *Id.* at ___, 113 S.Ct. at 2762 (Souter, J., dissenting). *See, e.g., Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 959 n.8 (5th Cir. 1993) (ADEA) (noting that "although prior to [*Hicks*], such evidence [discrediting the defendant's proffered explanation] certainly would be [sic] sufficient to avoid summary judgment and perhaps prevail at trial . . . [*Hicks*] *requires* more of the plaintiff than simply negating the employer's defense" (emphasis supplied)); *Seman v. Coplay Cement Co.*, ___ F.3d ___, ___, 64 Fair Empl. Prac. Cas. (BNA) 1749, 1757 (3d Cir. 1994) (ADEA) (similar); *Gallo v. Prudential Services*, 22 F.3d 1219, 1225 (2d Cir. 1994) (ADEA) (similar); *Barrow v. New Orleans Steamship Co.*, 10 F.3d 292, 298 n.22 (5th Cir. 1994) (Title VII and ADEA) (similar); *Odom v. Frank*, 3 F.3d 839, 850 (5th Cir. 1993) (Title VII and ADEA) (similar); *Pilditch v. Bd. of Educ. of Chicago*, 3 F.3d 1113, 1117-18 (7th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1065 (1994) (Title VII) (similar); *Dailey v. Johnson & Johnson*, 850 F.Supp. 549, 555 (N.D. Tex. 1994) (ADEA) (noting that under "pretext-plus" rule summary judgment will always be granted in favor of all but "stupid" defendants).

B. In disregard of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the courts of appeals have frequently failed, after *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S.Ct. 2742 (1993), to examine and weigh "indirect" evidence of intentional employment discrimination.

Courts following the "pretext-plus" language of *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S.Ct. 2472 (1993) have frequently required that plaintiffs set forth "direct" evidence of intentional discrimination to avoid summary judgment for the employer, because the difference between a showing of "pretext" and a showing of "pretext *for discrimination*" is generally direct evidence of discriminatory intent. "Direct" evidence has been defined as evidence which, if believed, leads inevitably to a finding of liability, while "indirect" or circumstantial evidence merely supports an inference

that unlawful discrimination has occurred. *See Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 958 (5th Cir. 1993). Courts requiring separate evidence of discriminatory animus, however, are split over what types of evidence, and in what combination, are sufficient after *Hicks*.

This lack of standards is apparent in the decisions of courts reading *Hicks* to require "direct" evidence as a matter of law. These courts have recently held that even statements by an employer reflecting a discriminatory bias in general are insufficient as a matter of law to allow the trier of fact to find intentional discrimination against a particular plaintiff. Compare *Cone v. Longmont Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994) (characterizing an employer's remarks that "long-term employees have a diminishing return" and that older employees had been terminated in the past because the defendant hospital "need[ed] some new young blood" as "stray comments" insufficient to establish discrimination finding) and *Pilditch v. Bd. of Educ. of Chicago*, 3 F.3d 1113, 1117-18 (7th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1065 (1994) (defendant's comment to white employee that the employer school "should have a stronger black male presence" not sufficient) with *Robinson v. PPG Industries*, 23 F.3d 1159 (7th Cir. 1994) (approving inference of connection between remark and discriminatory animus).

C. *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S.Ct. 2742 (1993), should be clarified and the "pretext-plus," direct evidence requirement it has been held to support should be rejected.

This Court has recognized that employment discrimination plaintiffs typically are unable to put forth direct evidence of discriminatory animus because "[t]here is seldom . . . 'eyewitness' testimony as to the employer's mental processes." *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983). Indeed, "[u]nless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree. Employers are rarely so cooperative as to include a notation in the personnel file, 'fired due to age,' or to inform a dismissed employee candidly that he is too old for the job." *Thornbrough v. Columbus & G. R.R.*, 760 F.2d 633, 638 (5th Cir. 1985). For this

reason, "[t]he shifting burdens of proof set forth in *McDonnell Douglas* [*Corp. v. Green*, 411 U.S. 792 (1973)] are designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence." *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985); *see also Aikens* at 717. If the trier of fact is not *permitted* to infer unlawful discrimination from the evidence establishing a *prima facie* case and pretext, then the burden-shifting formula of *McDonnell Douglas* and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), becomes in all cases a device without a purpose. *See St. Mary's Honor Center v. Hicks*, 509 U.S. ___, ___, 113 S.Ct. 2742, 2761 (1993) (Souter, J., dissenting). To interpret *Hicks* as requiring, as a matter of law, separate and additional evidence beyond that used to establish pretext and the *prima facie* case, therefore, is to find it in conflict with *McDonnell Douglas, Burdine* and *Thurston*. *See Hicks* at ___, 113 S.Ct. at 2764-65 (Souter, J., dissenting).

The Seventh Circuit has attempted in two of its recent decisions to resolve the conflict between the "pretext-plus" language of *Hicks* and this Court's other precedent. While recognizing that "a 'smoking gun' is not required" under the *McDonnell Douglas* formula," *Oxman v. WLS-TV*, 12 F.3d 652, 658 (1993), it initially held that "direct evidence of discriminatory intent might be the only evidence that would convince a trier of fact" in many cases "[a]s a practical matter." *Id.* at 658. *Cf. Vega v. Kodak Caribbean*, 3 F.3d 476, 479 (1st Cir. 1993) (concluding that discrimination plaintiffs must "ordinarily" do more than show pretext). The Seventh Circuit later attempted to resolve the conflict between the two competing interpretations of this Court's precedents with its determination that although "[i]t is true that there is some suggestion in *Hicks* that additional evidence of discrimination may be necessary before the factfinder can conclude that the actual reason was discrimination, . . . this language [i]s dicta, and we therefore ignore[] it." *Bybee v. Proctor Hosp.* at 4-5 (1994) (case below) (citing *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124, n.3 (7th Cir. 1994)). *Cf. Nahrebeski v. Cincinnati Milacron Mktg. Co.*, 835 F.Supp. 1130, 1135 (W.D. Mo. 1993) (holding that the "pretext-plus" language in *Hicks* is "dicta and should be read and applied with a critical eye"); *but cf. Waldron v. S.L. Industries, Inc.*, 849 F.Supp. 996, 1004 n.11

(D.N.J. 1994) (holding that language in *Hicks* that appears to *contradict* "pretext-plus" rule is to be ignored as dicta). As the "pretext-plus" opinions discussed above make clear, however, the courts of appeals are unwilling to entirely disregard the perceived suggestion that employment discrimination plaintiffs must, after *Hicks*, meet an elevated standard of proof. Their reluctance may be motivated by the same concern raised by the *Hicks* dissent, that

> "a willingness to disclaim the [Supreme] Court's considered pronouncements devalues them. Cases . . . that set forth an order of proof necessarily go beyond the minimum necessary to settle the narrow dispute presented, but evidentiary frameworks set up in this manner are not for that reason subject to summary dismissal in later cases as products of mere dicta."

509 U.S. at ___, 113 S.Ct. at 2765 (Souter, J., dissenting). Because "[c]ourts and litigants rely on th[e Supreme] Court to structure lawsuits based on federal statutes in an orderly and sensible manner," *id.* at ___, 113 S.Ct. at 2765, *Hicks* should be clarified so that future litigants might predict whether or not they will prevail on the evidence available to them.

III. The courts of appeals have been unable to fully consider whether an employer's proffered business reasons are in fact a pretext for intentional discrimination, without subjecting business decisions to judicial scrutiny.

A. This Court has directed lower courts to determine whether or not an employer was actually motivated by the business reasons proffered, but to simultaneously avoid second-guessing an employer's legitimate business judgments.

This Court established in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978) that a court may not review an employer's legitimate personnel policies in light of judicial preferences. The issue in that case was "whether the Court of Appeals had gone too far in substituting its own judgment as to proper hiring practices in the case of an employer which claimed the practices it had chosen did not violate Title VII," *id.* at 574, and this Court concluded that such an

error had been committed. *Id.* at 576-77. *Furnco* noted, however, that where a court can perceive no rational explanation, even a misguided business judgment or a decision based on mistaken information, intentional discrimination is a reasonable conclusion to draw because "we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting." *Id.* at 577. Thus, unless the error in judgment is "so apparent as to virtually jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty by virtue of their own years of experience and expertise in the field of question." *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993).

The Court of Appeals for the Seventh Circuit has taken this caution to an extreme, adopting a broad "business judgment" rule and deferring blindly to an employer's proffered business explanation even where that explanation appears irrational or where evidence suggests that the putative business judgment did not in fact motivate the employer's action. The Court of Appeals for the Seventh Circuit has explained that, where a plaintiff insists that the employer's proffered explanation is pretextual, it will not "delve into the question of which portrayal is the correct one" because it "does not sit as a super-personnel department that reexamines an entity's business decisions." *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987). *See also Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987); *Bybee v. Proctor Community Hosp.*, No. 93-3932, slip op. at 6 (7th Cir. June 3, 1994). While correctly observing that antidiscrimination statutes do not forbid exercising poor business judgment, the Seventh Circuit has failed to observe that the ADEA and Title VII cannot be enforced if employers are permitted to escape liability, as a matter of law, merely by articulating any business reason whether or not any such reason existed or any action was taken. "Everyone can make a mistake—but if the mistake is large enough, we may begin to wonder whether it was a mistake at all." *Thornbrough v. Columbus & G. R.R.*, 760 F.2d 633, 647 (5th Cir. 1985).

The Courts of Appeals for the Second and Third Circuits, in contrast, have announced an alternate means for determining whether an employer's proffered explanation is pretextual, without second-guessing retrospectively the prudence of the putative decision. In *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993), the employer, a religious school, claimed that it had terminated the plaintiff, a teacher, for failing to attend mass and lead his students in prayer. The court reasoned that in contrast to other ADEA or Title VII cases, where "a plaintiff may be able to put into question the genuineness of the employer's putative non-discriminatory purpose by arguing that the stated purpose is implausible, absurd or unwise . . . [w]e recognize that such a plausibility inquiry could give rise to constitutional problems where, as in the case at bar, a defendant proffers a religious purpose for a challenged employment action." *Id.* at 171. The court concluded that nevertheless, "a plaintiff will usually be able to challenge as pretextual the employer's justification without calling into question the value or truthfulness of the religious doctrine," *id.* at 171, explaining that "[t]he pretext inquiry . . . focuses upon *factual* questions such as whether the asserted reason for the challenged action comports with the defendant's policies and rules, whether the rule applied to the plaintiff has been applied uniformly, and whether the putative purpose was stated only after the allegation of discrimination." *Id.* at 171 (emphasis supplied).

The Third Circuit utilized a similar analysis of the "business judgment" rule, in a similar context, in *Geary v. Visitation of the Blessed Virgin Mary Parish School*, 7 F.3d 324 (1993). There, the court held that "[a] conclusion that the religious reason did not in fact motivate dismissal would not implicate [unconstitutional] entanglement since that conclusion implies nothing about the validity of the religious doctrine or practice . . . ." *Id.* at 330. A plaintiff terminated because she remarried, in violation of the religious doctrines of her employer, therefore, could still demonstrate that the remarriage was a pretext for age discrimination through evidence "demonstrat[ing], for example, that similarly remarried persons had not been fired, that she had not in fact marr[ied], or that [the employer's] explanation did not emerge until late in the litigation." *Id.* at 332.

B. In its decision below, the Seventh Circuit joined the Fifth and Eighth Circuits in holding that any explanation set forth by a defendant employer mandates a finding in the employer's favor in the absence of direct evidence of discrimination.

Affirming the findings of the District Court for the Central District of Illinois in the case below, the Court of Appeals for the Seventh Circuit echoed the approach of its previous opinions which have refused to closely analyze an employer's proffered reason for pretext because it will not "second-guess" legitimate employment decisions. The court of appeals has held that "[n]o matter how high-handed its decisional process, no matter how mistaken the firm's managers, Title VII . . . do[es] not interfere." *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987). Similarly, the court held in the case below that, while an employer's proffered reason may not be a "smokescreen for discrimination," *Bybee v. Proctor Community Hosp.*, No. 93-3932, slip op. at 6 (7th Cir. June 3, 1994), "[i]ts decision can be based on legitimate business reasons, on the quirks of its managers, or on the alignment of the stars."

In the case below, neither the district court nor the court of appeals appears to have given any consideration to the *factual* evidence, which may be considered without "second-guessing" the employer's judgment and which suggests that the reason proffered is not the actual reason for the employment decision. In other words, the court need not have "second-guessed" the wisdom of shifting personnel between hospital units and between shifts, and need not have contradicted the defendant's assertion that its "hospital-wide seniority policy" would be an effective means to select an employee to make a forced transfer. It should, however, consider that evidence which indicates that the employer itself was not in fact motivated by this policy when it selected the Petitioner for the forced transfer and constructive discharge. The employer had in fact never made any record of a "hospital-wide" seniority policy, and its officers had never approved such a policy. Indeed, the "policy" had never previously been utilized before it was used against the Petitioner and was never used later. The "floorwide" or "nursing" seniority policies

used in the past, under which the Petitioner would not have been subjected to the forced transfer and constructive discharge, were not used here. Further, the employer failed, without explanation, to follow its own recorded and established procedure for handling employee grievances in the case of the Petitioner. Finally, uncontroverted evidence reveals discriminatory bias on the part of the employer's decision maker. *Cf. Odom v. Frank*, 3 F.3d 839, 845 (5th Cir. 1993) (court finding itself "compelled" to accept an employer's evidence because "it was uncontradicted").

The standard for evaluating an employer's proffered business explanation that has evolved in the Second and Third Circuits, unlike the rule advanced by the Seventh Circuit, would in this case have enabled the court of appeals to give full consideration to the pretext question in accord with the *McDonnell Douglas* burden-shifting formula. Instead, the District Court found itself constrained to exclude the plaintiff's evidence suggesting pretext, see *Bybee*, No. 91-2256 (C.D. Ill. Nov. 24, 1993) at 4 (finding that "no evidence was offered on behalf of the plaintiff") while relying solely on the evidence of the defendant. *See id.* at 4 (finding that "the defendant hospital has shown by credible evidence that the transfer of plaintiff ... was not a pretext). Because it is the evidence of the *plaintiff*, not the defendant, which suggests pretext, this approach is inconsistent with *McDonnell Douglas* and this Court's other guidance regarding the pretext question. Therefore, this Court should endorse the "business judgment" rule adopted by the Second and Third Circuits in *DeMarco* and *Geary*, and reject the Seventh Circuit's "business judgment" rule as inconsistent with this Court's opinions.

IV. Supreme Court authorities failed to clarify relevant and applicable evidentiary standards in discrimination cases

Recent Supreme Court opinions have not clarified the question of what type of evidence Petitioner must submit in order to prevail. The need for such clarification not only arises from recent Supreme Court opinions, but also stems from the need of attorneys for employees and employers to know what procedures the courts will use to determine if an employer unlawfully discriminated. This issue extends beyond the issue answered by *Hicks*, that a plaintiff must submit some evidence indicating that the employer's stated reason

for taking an adverse employment action constitutes a pretext for discrimination. *Hicks*, 113 S.Ct. at 2747, 2750-54. Rather, the fundamental issue joined here concerns what evidence is needed to determine if age was a determining factor in the involuntary transfer of the Petitioner and whether the courts still recognize the value of indirect or circumstantial evidence or require direct evidence in order to find intentional age discrimination. The attached sub-issue involves the extent to which the Seventh Circuit has transformed the Respondent's burden of stating a legitimate, non-discriminatory reason for involuntarily transferring the Petitioner, a burden of production, into an unassailable "business judgment." The present factual scenario, where it is undisputed that the staffing schedule proposal never took place, should alert this Court to a situation where the doubtful satisfaction of a burden of production changed into automatic victory. The District Court's depiction of the Petitioner's proof as consisting only of her own perceptions was not upheld by the Seventh Circuit but affirmed by the aforementioned interpretation and application of the "business judgment rule."

Though Petitioner contends that the Seventh Circuit erred as a matter of law when it affirmed the factual findings the District Court made when sifting for traditional direct evidence, for example age derogatory comments made to Petitioner, the confusion should not surprise this Court. This Court has previously emphasized the need to assure that employees may prove discrimination with indirect evidence and has rejected attempts by lower courts to impose direct evidence requirements. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (ADEA); *See also, U.S. Postal Service Bd. of Governors*, 460 U.S. 711, n.3, 717 (1983) (Title VII); *Teamsters v. U.S.*, 431 U.S. 324, 358, n.44 (1977).

The *Hicks* case raises the possibility that proving intentional discrimination of any type, by using the indirect method of proof detailed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973), no longer exists. The elimination of the indirect method of proving age discrimination flows from the finding in *Hicks* that disproving the employer's stated legitimate justification only produces an "auxiliary" or supplementary method of proving discriminatory intent and offering direct evidence stands as the sole indepen-

dent method of proving discrimination. *Hicks*, 113 S.Ct. at 2753. In sharp contrast, this Court has held that direct evidence is not needed in order to prove a willful violation of ADEA.

> "We therefore reaffirm that the *Thurston* definition of "willful" — that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute — applies to all disparate treatment cases under the ADEA. Once a "willful" violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant rather than a determinative factor in the employment decision."

Hazen Paper Co. v. Biggins, ___ U.S. ___, 113 S.Ct. 1701, 1710 (1993).

The District Court's opinion cited and relied on *Hicks* when it held that Petitioner failed to submit any evidence of age discrimination. That use of *Hicks* can only be understood as requiring direct evidence which *Hazen Paper* states is not needed to even prove a willful violation of ADEA.

This interpretation and application of *Hicks* contradicts this Court's broad reading of Title VII law in sexual harassment cases. In such cases, this Court held that evidence involving a non-exclusive set of factors, intended to illuminate all the circumstances, determines whether a work environment is "hostile" or "abusive." *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367, 371 (1993); *See also, Carr v. Allison Gas Turbine Division*, ___ F.3d ___, 1994 WL 387091; pp.4-5 (7th Cir. 7/26/94, unofficial opinion) (District Court erred when applying legal standard to facts in sex harassment case and Appeals Court reversed and entered liability judgment for plaintiff). Given these contrasting analyses on the amount, nature and type of evidence required to prove intentional discrimination, it should not surprise that the lower federal courts appear to be tossed from side to side by the conflicting tides of cases expounding on the evidentiary standards applicable to Title VII, ADEA and other discrimination cases.

The need for clarification is further compelled by the Seventh Circuit authority indicating that Petitioner here submitted two types of direct evidence. In *Giacoletto v. Amax Zinc Co.*, 954 F.2d 424 (7th Cir. 1992), the Seventh Circuit explained that direct evidence of age discrimination consisted of the following:

1. That age was a determining factor, such as discriminatory statements uttered by the employer's decision-maker; and
2. That the employer's proffered reason is pretextual, such as a contradiction between the employer's proffered justification at trial and documentary evidence from the time of the decision.

Giacoletto, 954 F.2d at 425-26.

As previously indicated, the unrebutted evidence included testimony that the decision-maker, "patient care coordinator" (PCC) Susan Gulley, made a derogatory age related comment to Shirley Suits, an employee over 50 years of age, during the same year PCC Gulley involuntarily transferred Petitioner while knowing that said adverse employment action would result in the termination of Petitioner's employment. Furthermore, the documents of Respondent from the time of the involuntary transfer decision demonstrate a complete absence of any A.M. Admission numbers in or with the written staffing proposal seen only by PCC Gulley. In addition, Respondent's own staffing schedules reflect that Respondent never put into action the very staffing proposal supposedly compelling the involuntary transfer of Petitioner. Both the District Court and Seventh Circuit completely ignored the existence and significance of both types of direct evidence, which were unrebutted.

The effects of the opinions by the District Court and the Seventh Circuit include the following:

1. Unrebutted direct evidence of discrimination does not cause an employer to lose;
2. An employer may not only state any reason for an adverse employment action in order to meet its burden of production, it may also rely on the same reason in order to qualify

for the "business judgment" rule even though the uncontradicted evidence proves that the "business judgment" never happened;

3. Indirect evidence is useless for proving intentional discrimination.

Such results do not comport with recent Supreme Court authorities, which did not restrict previously approved, broad interpretations of anti-discrimination laws. This Court has previously indicated that considerations such as stare decisis contain "special force" in the arena of statutory interpretation because of the presence of the legislative power and the need for consistency. *Patterson v. Mclean Credit Union*, 491 U.S. 164, 172-73 (1989). The need for consistency in the formulation and application of evidentiary standards in discrimination cases looms over this Court's holdings in *Hicks*, *Harris* and *Hazen Paper* since the contents of each opinion prevent molding a coherent and consistent evidentiary standard which the lower courts can apply to discrimination cases.

CONCLUSION

For these reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the questions presented by this Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case Number: 91-2256

HELEN J. BYBEE

vs.

PROCTOR COMMUNITY HOSPITAL

JUDGMENT IN A CIVIL CASE

[Filed: Nov. 29, 1983]

☐ DECISION BY THE COURT. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the defendant and against the plaintiff, plus costs.

ENTER this 29th day of November, 1993.

/s/ John. M. Waters
JOHN M. WATERS, CLERK

/s/ Holly Williams
BY: DEPUTY CLERK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
AT DANVILLE

Case No. 91-2256

HELEN J. BYBEE,
Plaintiff,

vs.

PROCTOR COMMUNITY HOSPITAL,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER FOR JUDGMENT

[Filed: Nov. 24, 1993]

This is an action brought by plaintiff, Helen J. Bybee, against her former employer, Proctor Community Hospital, alleging discrimination on account of her age, in violation of the Age Discrimination in Employment Act (ADEA). The parties consented to trial of the matter before a United States Magistrate Judge and the assigned District Judge referred the matter to me. The parties further waived their right to a jury, and the matter was tried to the Court. For the reasons that follow, I find in favor of the defendant and against the plaintiff.

FINDINGS OF FACT

The following facts were stipulated by the parties:

1. The Court possesses jurisdiction over the present case, pursuant to 28 U.S.C. §1331 and 29 U.S.C. §626.

2. The plaintiff, Helen J. Bybee, was employed by defendant, Proctor Community Hospital ("Proctor Hospital"), from February 5, 1993 [sic] to November, 1988 as a licensed practical nurse ("LPN").

3. Plaintiff's date of birth is September 19, 1930.

4. The defendant, Proctor Hospital, a not-for-profit corporation, delivers health care and related services to residents of Central Illinois from its Peoria facility. It is an employer within the meaning of the Age Discrimination in Employment Act ("ADEA").

5. The plaintiff has timely filed charges of age discrimination with the Equal Employment Opportunity Commission and the Illinois Human Rights Commission and has met all the necessary administrative prerequisites for maintaining this action.

6. On November 1, 1988, plaintiff, Helen J. Bybee's employment with defendant, Proctor Hospital, ended.

7. Immediately prior to the date on which Bybee's employment with Proctor Hospital ended, the following persons held the positions with the defendant, Proctor Hospital, as set forth across from their names:

   Norman A. Laconte, Chief Executive Officer
   Garrett McGowan, Chief Operating Officer
   Michael Franks, Vice-President of Personnel
   Janice McCoy, Vice-President of Nursing Services
   Mary Jane Davis, Assistant Director of Nursing
   Susan Gulley, Patient Care Coordinator
   Jennifer Clyatt, Patient Care Coordinator

8. At all times immediately prior to the date on which plaintiff, Helen J. Bybee's employment with the defendant, Proctor Hospital, ended, plaintiff performed her job in an acceptable fashion in accordance with her employer's legitimate expectations.

9. Shortly before plaintiff, Helen J. Bybee's employment with defendant, Proctor Hospital, ended, plaintiff was directed to move from the first (day) shift job which she had worked for ten years to the third (night) shift on the same unit or floor of Proctor Hospital.

The Court finds the following based upon credible evidence at trial:

10. Plaintiff, Helen J. Bybee, attended nursing school and graduated in the early 1970's as an LPN, a licensed practical nurse and was hired by defendant, Proctor Hospital.

11. Helen J. Bybee was employed by Proctor as a licensed practical nurse (LPN) from February 5, 1973 through December 1, 1988.

12. When plaintiff started working for defendant, Proctor Hospital, she worked third shift primarily at 4-Northeast but worked occasionally in all other areas of the hospital except the emergency room.

13. After starting at 4-Northeast and working there for a while, plaintiff, Helen J. Bybee, moved into an opening on 4-Southwest in a third shift position in approximately 1974. She worked in her 4-Southwest third shift position for a period of approximately 6 1/2 years.

14. After working 6 1/2 years at the third shift 4-Southwest position, she moved to a first shift position on the portion of 4-Southwest which later became known a 4-Center. She worked in 4-Center until her employment terminated.

15. Each unit staffed by nurses has a head nurse known a Proctor as a Patient Care Coordinator (PCC). The PCC is the supervisor of the nursing staff on the unit

16. Among other things, the PCC determines the number of nursing staff required to cover the unit within certain accepted clinical guidelines, the mix of personnel (e.g. registered nurses or RN's, LPN's and nurses aides), and the work schedules.

17. Subject to certain hospital-wide guidelines, each PCC retained the authority to establish practices for her unit to provide quality patient care. The Hospital refers to this as "decentralized management".

18. The PCC for 4-Center was Susan Gulley, RN. Along with the other PCC's, Gulley reported to the Assistant Director of Nursing, Mary Jane Davis, RN. In turn, she reported to the Vice President of Nursing, Janice McCoy, RN. McCoy worked under the supervision of the Hospital's Chief Operating Officer, Garrett McGowan, who reported directly to its Chief Executive Officer, Norman LaConte. The Hospital maintained a Personnel Department headed by a Vice President, Michael Franks. Like McCoy, Franks reported to McGowan.

19. The role of Personnel Department at Proctor generally was to administer those employment practices set forth in its Employee Handbook and certain other documents such as its group health and insurance plan.

20. Beyond that, the Personnel Department, and Franks in particular, served as an advisor and consultant to the managers including the PCC's, working for the Hospital.

21. In late September and early October, 1988, Gulley began to evaluate the staffing in her unit. Her evaluation was prompted by a change in patient care on her unit which was essentially a surgical floor. The

Hospital and its physicians had initiated the practice of scheduling a number of "same day" surgeries. Those are procedures conducted on the same day of admission.

22. In conducting that evaluation Ms. Gully found it necessary to strike a balance in the staffing of her unit between the number of registered nurses (RNs) and number of licensed practical nurses (LPNs) who would be assigned to various shifts. In so doing, she found what she perceived to be a staffing imbalance between day and night shifts, which she set about to rectify.

23. Ms. Gully asked for volunteers to change shifts, but no one volunteered. She then attempted to determine whether seniority would apply to compel a transfer. She determined that total length of employment in the hospital would be controlling.

24. Plaintiff, Helen J. Bybee, had the least amount of overall seniority, and thus was selected for the compelled change of shift. She refused the transfer and elected to retire.

25. I find that no evidence was offered on behalf of the plaintiff to substantiate her claim of age discrimination. Her case is based on her perception without proof.

26. I find that the defendant hospital has shown by credible evidence that the transfer of plaintiff was based on sound reasons and was not a pretext.

CONCLUSIONS OF LAW

In order to pervail [sic] on her claim, plaintiff bears the burden of proof that she was discriminated against on account of her age. *St. Mary's Honor Center v. Melvin Hicks*, ___ vs. ___ 113 S.Ct.

2742 (1993). The plaintiff has only presented evidence that she perceived that the employer's actions were prompted by her age, but she has no proof.

Having so found that the plaintiff has failed in her proof, I find in favor of the defendant and against the plaintiff. The clerk of the court is, therefore, ordered to enter judgment in favor of the defendant and against the plaintiff.

ENTER this __ day of November, 1993.

/s/ Robert J. Kauffman
ROBERT J. KAUFFMAN
UNITED STATES
MAGISTRATE JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: June 3, 1994

BEFORE: Honorable RICHARD D. CUDAHY, Circuit Judge

Honorable MICHAEL S. KANNE, Circuit Judge

Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 93-3932

HELEN J. BYBEE,
Plaintiff-Appellant,

v.

PROCTOR COMMUNITY HOSPITAL,
Defendant-Appellee.

Appeal from the United States District Court for the Central District of Illinois, Danville Division
No. 91 C 2256, Robert J. Kauffman, Magistrate Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Argued May 13, 1994

Decided June 3, 1994

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

No. 93-3932

HELEN J. BYBEE,
Plaintiff/Appellant

v.

PROCTOR COMMUNITY HOSPITAL,
Defendant/Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.

No. 91 C 2256

Robert J. Kauffman,
Magistrate Judge.

ORDER

I.

Beginning in 1973, when she was 42 years old, Helen Bybee worked as a licensed practical nurse (LPN) at Proctor Community Hospital in Peoria, Illinois. She worked the night shift (from

11 p.m. until 7 a.m.) for more than seven years, most of that time at the same station on the hospital's fourth floor, then known as 4-Southwest.

After working for six and a half years on the night shift at 4-Southwest,[1] a position opened up on the day shift. Bybee was then permitted to transfer (apparently because she had been on the night shift the longest) to the day shift (7 a.m. to 3 p.m.). She worked day shifts until 1988.

But in 1987 things began to change around the hospital. At that time, the 4-Southwest station was divided in two, the new stations being named 4-South (which became an oncology station) and 4-Central (which became a surgical station). Bybee was assigned to 4-Central.

Each station had a Patient Care Coordinator, who is essentially a head nurse in charge of staffing the station. In March 1988, a woman named Sue Gully became PCC of 4-Central. In May of that year, she and her counterpart in 4-South agreed that in light of the hospital's changing needs, a registered nurse (RN) from 4-Central (Amy Mauschbaugh) should be sent to 4-South; while an LPN from 4-South (Carol Roper) should be sent to 4-Central.

That swap left Bybee and Roper as the two LPNs on the first shift at 4-Central. Then, in the fall of 1988, Gulley decided that there were too may LPNs on the first shift, and wanted to trade

---

[1] The record is less than clear about when this transpired. Bybee testified that it was in 1988, though this is a mathematical impossibility, and it appears she misunderstood the question. The district court found that she worked night shifts "for a while" at 4-Northeast (the testimony at trial describes it as "a couple of years") and then for six and a half years at 4-Southwest. This most likely leaves us sometime between 1979 and 1982. The precise resolution of this factual dispute, in any event, is inconsequential to the disposition of this appeal.

a first-shift LPN for a third-shift RN. This decision was allegedly prompted by an increase in same-day surgeries.

Same-day surgeries are (logically enough) surgical procedures performed on the same day as admission. In order to perform such procedures, patients are admitted to the hospital in the wee hours of the morning, typically before the first shift begins at 7 a.m. There is a substantial amount of preparatory work to be done when the patient is first admitted, work for which an LPN is well suited and that does not require the greater expertise of an RN.

Gulley first asked whether either Bybee or Roper would volunteer to move to the night shift. She also asked one of the LPNs on the second shift (3 p.m. to 11 p.m.) if she would move to the third shift. When none of the three agreed, Gulley forced Bybee to transfer to the night shift, ostensibly because she had less seniority. While Bybee had less "hospital-wide" seniority then [sic] Roper, who had worked for some time as an aide before becoming a nurse, she had greater "nursing-wide" seniority, as well as of course greater seniority at the station ("unit seniority"). The hospital, it appears, had no formal seniority policy.

The transfer was particularly burdensome to Bybee, who was then turning 58 years old. In September 1987 her 22-year-old son (John) was in a car accident, having been rear-ended by a drunken driver. He was in a deep coma until January 1988, when he — though still semi-comatose — returned home.

Upon John's return, he needed 24-hour care. Bybee's husband took care of John during the day, but worked afternoons. Bybee — who was then working days — was herself responsible for caring for John during the night. She needed to be home at night because her husband, who is hard of hearing, could not hear the bell that they left by John's bedside and that he would ring when he needed assistance. Bybee testified that upon her transfer to the night shift they were unable to find someone to

care for John at night, and that she therefore quit her job at Proctor. Bybee also testified at trial that her supervisors at Proctor, including Gulley, were well-apprised of her predicament. In addition, despite the suggestion that the hospital needed an additional LPN during the night shift, following Bybee's resignation Proctor did not replace her on the third shift with another full-time LPN (but rather with an RN).

Bybee attempted to seek redress through the hospital's grievance procedure, though to no avail. She then sued, claiming age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et. seq.*, which forbids discrimination in the terms of employment, against those aged 40 and over, on account of their age. The matter was tried to a magistrate judge, who found in favor of the hospital. The magistrate found, in written findings of fact, that:

> 24. Plaintiff, Helen Bybee, had the least amount of overall seniority, and thus was selected for the compelled change of shift. She refused the transfer and elected to retire.
>
> 25. I find that no evidence was offered on behalf of the plaintiff to substantiate her claim of age discrimination. Her case is based on her perception without proof.
>
> 26. I find that the defendant hospital has shown by credible evidence that the transfer of plaintiff was based on sound reasons and was not a pretext.

Finding of Fact, Conclusions of Law & Order for Judgment (Nov. 24, 1993) at 4.

Having found that Bybee failed to carry her burden of proving that she was discriminated against on account of her age, the court entered judgment in favor of the hospital. *Id.* Bybee here appeals that judgment, as 28 U.S.C. § 636 (c)(3) allows.

On appeal, Bybee makes essentially two arguments: that the court applied the wrong legal standard and that its findings of fact

were clearly erroneous. But we discern no reversible error, and therefore affirm.

II.

A.

Bybee first attacks the legal standard the court employed. She says that given "the extensive and overwhelming circumstantial and indirect evidence," the court must have read the recent Supreme Court decision in *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993), to "mean that Bybee may not use the indirect method of proof, which relies on circumstantial evidence, to prove that she was discriminated against and treated less favorably on the basis of her age." Br. at 31.

A plaintiff alleging intentional employment discrimination must prove discrimination either (1) directly, or (2) by the indirect method, which involves the three-step structured dance of burden-shifting set out in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that test, a plaintiff makes out a prima facie case by showing that while she was meeting her employer's legitimate expectations, she was treated worse than others who do not belong to a protected class. If the plaintiff makes out a prima facie case, the defendant can rebut it by articulating a non-discriminatory explanation for its employment decision. The plaintiff then bears the burden of proving that the nondiscriminatory reason is merely "pretextual" — that the actual explanation is discrimination.

The point of this is that the law acknowledges that it would be very difficult for an employee to put forward direct evidence of her employer's discrimination to be drawn where an ostensibly non-employment decision is shown to be pretextual. The last stage of the *McDonnell-Douglas* analysis thus requires the plaintiff to prove pretext.

A frequently arising question under this analysis is what happens if an employer comes forward with a non-discrimina-

tory justification for its decision, and it turns out that explanation is a lie. The Court in *Hicks* said that proving that the employer is lying is not necessarily enough for the plaintiff to prevail. The factfinder is entitled to infer from the fact that the employer is lying — though it need not — that the actual reason for the decision is discriminatory. That, as we noted in *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994), was the law in this circuit even before *Hicks*, *see, e.g., Visser v. Packer Engineering Assoc.*, 924 F.2d 655, 657 (7th Cir. 1991) (en banc). It is true that there is some suggestion in *Hicks* that additional evidence of discrimination may be necessary before the factfinder can conclude that the actual reason was discrimination, but in *Anderson* we concluded that this language was dicta, and we therefore ignored it. *Anderson*, 13 F.2d at 1124 n.3.

But the point of this three-step burden shifting analysis is to provide an orderly way for the court to evaluate the evidence on the question of discrimination. The ultimate question of fact remains the same: whether "the defendant intentionally discriminated against the plaintiff." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). And the factfinder asks this question "directly, just as district courts decide disputed questions of fact in other civil litigation." *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715-16 (1983); *see also, Kier v. Commercial Union Ins. Companies*, 808 F.2d 1254, 1257 (7th Cir. 1987).

Bybee is therefore mistaken in contending that the court refused to allow her to use the indirect method of proof. At the end of the trial the finder of fact concluded that Bybee failed to satisfy her burden of proving that the hospital's proffered reason for transferring her was pretextual. "I find that the defendant hospital has shown by credible evidence that the transfer of plaintiff was based on sound reasons and was not a pretext." Findings of Fact, Conclusions of Law & Order for Judgment (Nov. 24, 1993) at 4. Bybee's real complaint is with this factual

determination. There is no credible suggestion, however, that the court employed the wrong legal standard or refused to allow her to take advantage of the indirect burden-shifting method of proof.

Nor is there merit to her related argument that the court erroneously found that she failed to make out a prima facie case. It is clear (and Proctor admits) that Bybee did make out a prima facie case of discrimination. It is also clear that Proctor articulated a nondiscriminatory justification for its decision: Bybee had the least hospital-wide seniority. The question therefore boiled down to whether the nondiscriminatory reason was pretext, that Bybee was *actually* forced to transfer because the hospital was discriminating against her on the basis of her age. Again, the court made a factual determination that it was not. Bybee's only recourse on appeal therefore is to take issue with this factual finding. And she does.

B.

Bybee insists that the court's factual determination is clearly erroneous. She argues that the testimony of the hospital employees was contradictory, a fact which she says "greatly diminished the credibility of their testimony." Br. at 40. She also points to the testimony of Shirley Suits, Susan Gulley's predecessor as head nurse at the Four-Southwest (and later Four-Central). Suits testified that Bybee's work exceeded all expectations in her years as an LPN (a fact that no one disputes), and further testified that she felt that she had herself been discriminated against on the basis of her age when she was terminated in 1988 (she was almost 50 years old at the time).

Proctor counters this by denying that it discriminated against either Suits or Bybee on the basis of their age. Rather, Proctor insists that Suits was terminated "for reasons related to her managerial skills," Br. at 26, and that Bybee was forced to transfer because she had the least hospital-wide seniority. It

further argues that the choice of what type of seniority system to use is a business decision that is not subject to second guessing by the courts. Br. at 20.

This claim overstates its case. If Proctor used hospital-wide seniority, rather than nursing-wide or unit-wide seniority, in order to disadvantage Bybee — and did so on account of Bybee's age — it would have violated ADEA and would liable for damages. But the hospital is correct in saying that federal law otherwise does not prevent it from adopting whatever type of seniority system it wants. Its decision can be based on legitimate business reasons, on the quirks of its managers, or on the alignment of the stars. But it cannot be a smokescreen for an attempt to discriminate on the basis of age. The ultimate point in this case is that the finder of fact determined that the policy choice represented a legitimate business decision, and was not pretext to disguise discriminatory motivation.

Bybee points to some evidence that supports the opposite conclusion.. It is clear that both sides had some support in the record for the ultimate conclusion they were asking the court to draw. Deciding disputed questions of fact is a matter left for the exclusive providence of the factfinder, whose decisions are not subject to appellate review save for cases of *clear error*. *See* Fed. R. Civ. P. 52(a). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. Bessemer City,* 470 U.S. 564, 573 (1985). Rather, a finding is clearly erroneous only when the "reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.,* 333 U.S. 364, 395 (1948). *See also Hughes v. Brown,* No. 93-1948, slip op. at 5 (7th Cir. Mar. 31, 1994). Deference is particularly appropriate where (as here) the factfinder hears the testimony of witnesses and accordingly makes credibility determinations. *Id.* at 4-5; *cf. Santa Fe Pacific*

Corp. v. Central States, Southeast and Southwest Areas Pension Fund, Nos. 93-2736 & 93-2899, slip op. at 4 (7th Cir. Apr. 22, 1994) ("We can reject the district judge's factual inferences from testimony only if they are clearly erroneous, but they do not have the additional insulation from appellate review that determinations of credibility enjoy.").

In this case, there was evidence on both sides of the issue, and the factfinder ultimately believed the defendants' witnesses who testified that the decision was made for neutral business reasons. That determination is perhaps not the only one supportable in the record, though it undoubtedly has a reasonable basis therein. That being the case, we will not second-guess the court's conclusion. Because we have no "definite and firm conviction that a mistake has been committed," we affirm the judgment below.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

91-CV-2256

HELEN J. BYBEE,
Plaintiff,

vs.

PROCTOR COMMUNITY HOSPITAL,
Defendant.

VOLUME ONE OF TWO

BENCH TRIAL

Wednesday, October 7, 1992
Morning and Afternoon Session.

BEFORE:

ROBERT J. KAUFFMAN,
MAGISTRATE JUDGE.

PRESENT:

R. WAYNE HARVEY and AMBROSE V. McCALL,
(Harvey & Stuckel)
900 River Valley Plaza
Peoria, Illinois 61602,
on behalf of the plaintiff;

ROY G. DAVIS and ROBERT RIFFLE,
(Keck Mahin & Cate)
640 River Valley Plaza
Peoria, Illinois 61602,
on behalf of the defendant.

George R. Kozuch, C.S.R.

EXHIBITS

	In Ev.
Plaintiff's	
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124 (Listing of LPN's)	
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[22]

A Yes.

Q And what is your present position?

A I am President and chief executive officer.

Q At the end of 19 — in December of 1991 you changed the name of the hospital to — from Proctor Community Hospital to Proctor Hospital, correct?

A Yes.

Q When did you become the chief executive officer?

A In 1980.

Q And tell us your functions as chief executive officer at Proctor Hospital.

A I am — my function as the chief executive officer of the hospital is that I am responsible for the overall management of the hospital and I am accountable to the board of directors.

Q And one of the things that you are responsible for at the hospital is the approval of all sorts of problems, would that be correct, at the hospital?

A I am responsible for approval of all policies.

Q And for the seniority policies?

[23]

A Yes.

Q And as far as seniority concerning nursing staff, is there any?

A We have no formal seniority policy.

Q Is there a seniority policy concerning any type — concerning the nursing staff, concerning anything?

A Not that I am aware of.

Q Is there a seniority policy concerning pension benefits, vacation benefits and those types of things? In other words, the longer you are there, the more vacation you get?

A Oh, yes, yes.

Q And the longer you are there the more pension you get?

A Yes.

Q And the longer that you are there the more days you can accumulate as far as sick pay?

A Yes.

Q Now, I'm going to show you this book here and ask —

THE COURT: Is that marked?

MR. HARVEY: I'm going to have that marked.

* * *

[27]

MR. DAVIS: I object to the form of the question. We dispute that Helen was required to resign.

THE COURT: Sustained.

MR. HARVEY: Well, we dispute that she was.

THE COURT: Okay, next question, Mr. Harvey.

BY MR. HARVEY:

Q What is the reason that she was placed in — a predicament that she was placed in was because the hospital used a hospital-wide seniority system in this here case; is that correct?

A I'm not familiar with the details of Mrs. Bybee's case.

Q Do you know anything about the use of hospital-wide seniority?

A No.

Q And in that particular policy hospital-wide seniority is something that has never been brought to you or approved by you; is that correct?

A We have no official policy in that regard.

Q But it is something that has never been brought to you or approved by you; is that correct?

A We have no policy in that regard.

[28]

Q Did anyone ever come to you personally — Mr. Franks or Mr. McGowan — and say, "We are going to have a policy in this hospital concerning — based on hospital-wide seniority?

A No.

Q And did you ever approve a policy like that?

A No.

Q Concerning Helen Bybee, you had — you never had anything to do with her grievance; is that correct?

A That is correct.

Q And if you had received anything or anything had been generated and directed to you, that would have been given to Mr. McGowan; is that correct?

A That's correct.

Q The grievance procedure that was to be used at Proctor Hospital is contained, I believe, starting on page 39, if I am not

mistaken — 40; is that correct?

A Yes.

Q And I am referring to Plaintiff's Exhibit No. 1. And the only time you became involved would be at Step Three; is that correct?

[29]

A Yes.

Q And Step Three, if I am not mistaken, states, "That the employee shall submit his complaint to the hospital in writing"; is that correct?

A To the hospital president in writing.

Q President in writing?

A Right.

Q Now when — this is something, though, that you refer to — as you have designated, to the assistant, to Mr. McGowan to handle?

A Yes, that is provided for in the policy.

Q And you don't know whether Mr. McGowan acted on the grievance that Helen directed toward you; is that correct?

A I believe a grievance was submitted to me which I gave directly to Mr. McGowan.

Q From Helen?

A Yes.

Q Now, moving off Helen and going to another matter, Shirley Suits, do you remember Shirley Suits?

A Yes.

Q Were you directly involved in Shirley Suits' termination?

* * *

[40]

* * *

Q And are you familiar with a term "departmental seniority"?

[41]

A If I understand the term, I would believe it means seniority within a certain working unit or department. Who is the most senior in that unit.

Q Are you at all familiar with the — with the employee handbook?

A Yes.

Q This plaintiff's exhibit, did you have any input into that?

A No.

Q Who would have had the input in creating this?

A Mike Franks, Vice-president at this time.

Q What is hospital seniority? Are you familiar with that at all?

A Again I would say that it probably means seniority within the entire organization.

Q Had you ever heard that term used other than in the Helen Bybee case?

A No, I don't believe so.

Q So the first time it came about, as far as you can recall and since, is in the case of Helen; would that be fair?

A Yes.

* * *

[47]

between staffing mix, so that the number of RN's on the day shift would increase. And to do that they wanted to transfer an RN from the third shift to the — third shift to the day shift. So as to equalize that staffing, they would have shifted someone from the day shift down to the night shift.

Q And as the RN — If I understand your earlier testimony, this was the first and only time that the idea of "hospital seniority" came into play in determining who was moved?

A As far as I can recall.

Q And by "recall," you mean you can't think of any other time it came into play?

A In this case or any other instance in the hospital.

Q In the hospital?

A Not that I recall. It's not to say it didn't happen but I may not have been involved in it.

Q Do you know why Helen couldn't work this third shift? Did you know why?

A I think what I recall from that and since this proceeding has started, that she wanted to be —

MR. DAVIS: I object to the witness' [48] testimony what he learned since these proceedings had started, your Honor.

THE COURT: Sustained.

BY MR. HARVEY:

Q Well, did you know at the time why she couldn't work third shift?

A Yes.

Q What was that?

A She wanted to be at home with her son, who had been injured in an accident.

Q And you don't ever recall Mr. Laconte referring to Helen's third-step grievance, do you?

A No, I don't.

Q Do you recall a meeting with Shirley Suits and Jan McCoy in April of 1988?

A Vaguely, yes.

Q And do you recall it being brought up by Shirley Suits or her asking the question if there was a position at PCH for her?

A I can't really recall the details of that conversation.

Q Do you recall her bringing up the fact that she was — wondering at the — on April 25th, 1988 the

* * *

[71]

* * *

Q Now, you became involved in Helen Bybee leaving the hospital; isn't that correct?

A Yes.

Q And isn't it true that you became involved in this somewhere towards the end of October of 1988?

A Approximately, yes.

Q And that is because Sue Gulley came to you; is that correct?

A At that time I was not aware of who the parties were that were involved.

Q My question is, Sue Gulley came to you; is that right?

[72]

A That would be the one, yes.

Q And she came to you concerning what to do about this staffing change, or need, or mix change that she needed to make; is that correct?

A Yes.

Q And you informed her that, concerning seniority at that point in time, the hospital didn't have a policy; isn't that correct?

A Yes.

Q In fact the first time the policy or hospital seniority policy was ever implemented was concerning Helen; is that correct?

A It is the first time it had been brought to me with this type of situation for asking me the question of how would seniority be determined.

I said it had — no one had brought that to me. I was not aware that had been done or not. So it may have occurred but had just not been brought to my attention.

Q But you are the personnel person?

A Yes.

Q And in fact didn't Sue Gulley tell you that Jan McCoy came to you for guidance?

[73]

A No, Sue Gulley — as I recall, Sue Gulley came to me and said that the LPN's had raised the question of how was seniority

going to be determined. And I said I did not — as I recall I said that I — "I don't recall there is any specific policy in this regard."

And I suggested she ask Jan McCoy, who is vice-president of nursing, that there was a policy within nursing or there was a — had been a precedent that she was award of that we could use.

Q Did Jan tell you, "No, there wasn't"?

A Yes.

Q You had a meeting with Jan?

A Jan and I met, yes.

Q And Jan said, "No, there wasn't precedent," and between the three of you you came up with the idea of using, in Helen's case, for the first time using hospital seniority?

A I believe it was Jan's recommendation and I agreed to it.

Q And by "hospital seniority" what you mean is it doesn't matter how long you have been in the department, it doesn't matter how long you have been [74] an LPN functioning as an LPN at Proctor Hospital, or how long you have been in a particular department at Proctor Hospital. What your determining is it's just how long a person who has bumping rights in this particular —

A There is no such thing as bumping rights.

Q In this case it was a bump, wasn't it? She got to bump her, Carol Roper got to bump Helen as far as going to a position?

A I am not aware of the term.

Q What term would you use, if not bumping? One employee gets a right over another employee about where they are going to go?

A It's just a transfer.

Q As far as transferring policy, meaning from one shift to another shift, the three of you decided on hospital seniority, correct?

A It was Jan McCoy's and Sue Gulley's decision. They came to me to see if I had any problems with that, and I said no. I agreed with the reasoning that they were using.

Q Were you ever explained the reason that this change involving Helen had to be made?

[75]

A The staffing mix change?

Q Yes.

A It was discussed. I am not responsible for that. It was discussed just by nature of why Sue Gully had come to me in the first place. She indicated that there was a need to make a staffing change which is going to be changing of LPN there and RN to a different shift.

Q But you didn't get into the reasoning behind it?

A It was discussed, but no.

Q And one further question on that — in that area. At any time after November when Helen left in November of 1988 did Sue Gulley or Mary Jane Davis ever come to you and ask you to post, to find a full-time LPN for third shift on Four-C?

A Yes, the posting policy we just looked at in the handbook indicates that would not occur because we do not post those types of things. Nursing would handle that.

Q When you need someone to fill a position and it is not filled within the unit, does it come to you?

A Yes.

* * *

[77]

* * *

Q Now I'm a litte confused as to what your understanding was. Wasn't your understanding with the [78] trade of an LPN from the day — a full-time LPN, a part-time — a full-time LPN from the day to the night?

A Yes.

Q And a full-time RN from the night to the day?

A Yes.

Q When Helen didn't take that position of the night LPN position, do you know if that position was ever filled?

A I don't know, and I wouldn't necessarily know.

Q You don't know. No one — regardless of the reasoning, no one at any time — Mary Jane Davis, Jan McCoy, or Sue Gulley whoever comes directly to you — would come and say, "Mr. Franks, we don't have any LPN's on our unit today or my unit Four-C or Four-S, who are going to work third shift? Would you please post it upon the board by the elevator," as explained in the manual, "to see if you can find us that additional human being," did anyone ever do that?

A No.

THE COURT: Are you finished Mr. Harvey?

[79]

MR. HARVEY: Oh, no.

Q The policy, this hospital-wide policy that you enacted in Helen's case, has that ever been written into a written policy?

A. No.

Q That particular policy that was enacted was never taken to Mr. McGowan or Mr. Laconte for approval; is that correct?

A No, it was just the decision — how the decision was going to be made in this particular instance.

Q By the way, just so it is clear, there was never any criticism of Helen Bybee's clinical care —

A No.

Q — right? By either Sue or Jan?

A No.

Q There was never any criticism that you knew of, or told to you, concerning patient's complaints concerning the care rendered by Helen?

A Not that I recall.

Q And you do not recall any criticism being generated to you or from Sue or Jan concerning doctors complaining about the care being given by Helen; is

* * *

[83]

for her, and I had talked to her about what is available and what types of things.

I was trying to explain to Helen that we are trying to find something else but we're having difficulty doing it. And told her some of the things, as an example, that we were considering.

Q But to the best of your knowledge that first option — a short-term leave that subsequently became available — was never given to Helen; is that correct?

A As I recall, Helen wasn't satisfied with any of these. It went to a point, when we discussed these — these are the things that are being discussed and she wasn't interested. She felt she should pick her own position.

Q My question is, do you know whether she was given that option? Did you give her that option?

A No, I did not.

Q Do you know whether Helen — or Sue gave her that option?

A I don't.

Q Number two is, "Consider as replacement for upcoming leave of absence replacement." My question [84] is, did you give her that option?

THE COURT: I'm sorry, would you repeat number two again, please?

MR. HARVEY: Yes, sir. "Consider as replacement for upcoming leave of absence replacement."

A I don't recall if that was referring to a specific leave of absence or we just said that, you know, that's something that could possibly happen. If somebody else gets leave, that there may be — I wasn't in no position right now.

"There could be somebody else that goes on a leave of absence and could you please take that position?

Q Did you give her that option?

A I would not have been the one giving her that option.

Q You did not give her that?

A No, I did not.

Q You do not know whether Sue or Jan —

A I was trying to assist Helen in this regard because — and Sue in this regard, in trying to come up with something that would be mutually agreeable [85] between both parties.

Q I understand that. I just want to know specifically your knowledge. First, you didn't give her that option?

A I did not and I do not know if she did or not.

A Or Janice?

A Or Janice.

Q Fine, and No. 3 was: "To find another position for Carol Roper and return Helen to—" Of Course, that option wasn't give to her nor did Janice or Sue give her that option, correct?

A Correct. These are things that were being discussed is what I was trying to communicate.

Q Now, you did have a discussion with Helen concerning another position at the hospital, other than the third shift, didn't you?

A We might have talked about a unit secretary's position.

Q And do you recall talking to her about working as a unit secretary?

A Vaguely.

Q You don't recall that conversation other

* * *

[88]

don't think there has been any prior discussion in the courtroom about that incident until a second ago. And the witness admits that he doesn't know anything about it.

MR. HARVEY: I will withdraw the question.

Q Did you become at all involved in the "Shirley Suits" termination?

A Not the termination. She filed a grievance.

Q Before we go there, let me just ask you a few more questions concerning Helen and her transfer. Helen was considered above-average employee; is that correct?

A As far as I know, yes.

Q And Helen's problem was not working second shift, it was purely third shift?

A So I understood, yes.

Q And you understand the reason she couldn't work third shift, that had been explained to you?

A She explained it to me.

Q And what was that?

A She said that because of the severe injury that her son had received from the accident, that she needed to be home at night to care for him.

[89]

Her husband, I believe, was on second shift but she had a concern that he was hard of hearing, I believe, and would not be able to hear the son's request for any help or assistance.

Q The LPN's working either second shift on her unit Four-C were not considered in this move, is that your understanding of it?

A I wouldn't know for sure. It is my understanding that that is — that it was only involving that they step in the night shift.

Q So Sue and Jan didn't take into consideration the seniority of people working second shift, right?

A I don't know for sure if they did or didn't. I would not have been involved in those conversations.

Q But your understanding is they didn't; is that correct?

A My understanding is that the — I think — in all types of circumstances and what-not, as fair as I know the considerations were primarily between the day and the night shift.

Q And in —

A That is where the problems were and that is

* * *

[117]

Q Did you perceive, after reading the last two paragraphs of this letter, that Helen had a compelling desire to stay at Proctor?

A Yes.

Q And not resign?

A I think Helen was hurt that she was in a position that she wouldn't be working any more.

Q At Proctor?

MR. HARVEY: Thank you.

THE COURT: Anything further?

MR. DAVIS: No, your Honor. Thank you.

THE COURT: It occurred to me that there is a stipulation of facts as to the final pretrial order, and since that contains certain facts that are considered by the Court at a bench trial, it may be well to read that stipulation into the record; so the record is complete. And then we will take our lunch break.

The stipulation reads as follows:

"1. The Court possesses jurisdiction over the present case, pursuant to 28 U.S.C. Section 1331 and 29 U.S.C. Section [118] 626.

"2. The plaintiff, Helen J. Bybee, was employed by defendant, Proctor Community Hospital, from February 5, 1973 to November, 1988, as a Licensed Practical Nurse (LPN).

"3. Plaintiff's date of birth is September 19, 1930.

"4. The defendant, Proctor Community Hospital, a not-for-profit corporation, delivers health care and related services to residents of central Illinois form [sic] its Peoria facility. It is an employer within the meaning of the Age Discrimination and employment Act.

"5. The plaintiff has timely filed charges of age discrimination with the Equal Employment Opportunity Commission and the Illinois Human Rights Commission and has met all the necessary administrative prerequisites for maintaining this action.

"6. On November 1, 1988, plaintiff's, Helen J. Bybee, employment with defendant, Proctor Community Hospital, ended.

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"7. Immediately prior to the date on which Bybee's employment with Proctor ended, the following persons held the positions with the defendant, Proctor Community Hospital, as set forth across from their names:

"Norman A. Laconte, Chief Executive Officer; Garrett McGowan, Chief Operating Officer; Michael Franks, Vice-president of Personnel; Janice McCoy, Vice-president, Nursing Services; Mary Jane Davis, Assistant Director of Nursing; Susan Gulley, Patient Care Coordinator; and Jennifer Clyatt, Patient Care Coordinator.

"8. At all times immediately prior to the date on which plaintiff's, Helen J. Bybee, employment with the defendant, Proctor Community Hospital, ended, plaintiff Helen J. Bybee, performed her job in an acceptable fashion in accordance with her employer's legitimate expectations.

"9. Shortly before plaintiff's, Helen J. Bybee, employment with defendant, Proctor [120] Community Hospital, ended, plaintiff was directed to move from the first (day) shift job which she had worked for ten years to the third (night) shift on the same unit or floor of Proctor Community Hospital."

Did I read that accurately?

MR. DAVIS: Yes, your Honor.

MR. HARVEY: Yes.

THE COURT: We will take a lunch break now and I will look to reconvene at 1:30. Anything else before we go?

MR. DAVIS: It might be helpful on one point. The next witness is Janice McCoy, the person who is now off in Cape Canaveral, Florida, a much more beautiful climate. I have proposed and maybe Mr. Harvey agrees, that rather than to hear and read that deposition into the record that we submit it as an exhibit. The purpose being it would save us a lot of time.

It has already been transcribed once and transcribing it again it going to cost money.

MR. HARVEY: The money part is not a major

* * *

[151]

that.

MR. DAVIS: Your Honor, I think we better make it clear that the witness just testified that proposal was never submitted

to her. I mean we can go back and have her testify again, but I think that was her testimony.

HEARING OFFICER: Perhaps I misunderstood.

MR. HARVEY: But she did discuss the proposal.

THE COURT: Well, you testified that she has discussed this proposal with Miss Gulley.

MR. HARVEY: Correct.

A I discussed a proposal. As I said, I never seen this proposal so —

MR. HARVEY: I will ask her my question the other way.

Q It was obvious to have a full-time LPN on the third shift; is that correct?

A True.

Q And that it had to be a full-time LPN, isn't that true?

A Because they were — yes, sir.

Q You wanted a full-time LPN to go to third **[152]** shift; is that correct?

A (Nodding head.)

Q And she was going to move a full-time RN to first shift; is that correct?

A Yes.

Q From your review of the staffing schedule, was the full-time LPN to third shift ever implemented?

A No.

Q Were you at any time, after Helen turned down the position on third shift, ever asked to procure a full-time RN or LPN for third shift?

A To procure? I am not sure —

A Well, procure. It was never fulfilled and if we take a look at the staffing schedule and we see we have one less person. Plaintiff's Exhibit — here's December of '88. December of '88 would have been the first month of the proposal that Sue Gulley came about, correct?

A Uh-huh.

Q And in December of 1988 — Plaintiff's Exhibit 165 is the staffing proposal — was a full-time LPN ever found or did a full-time LPN ever work during the month of December, 1988?

[153]

A Not from this schedule, no.

Q Now, I'm going to show you October, 1988, third shift, okay?

A Uh-huh.

Q This is when the problems are arising and you are discussing them. How many RN's were working basically each night?

A Two.

Q William, full-time?

A Oh, you mean FTE's.

Q FTE's, Atwater was full-time, Anne Teece (phonetic) was full-time and then there was another lady that came in part time; is that correct?

A Doesn't look like —

Q She was in four days a week?

A Uh-huh.

Q After the proposal, Atwater moved to first shift?

A Uh-huh.

Q Who is now gone and we now have Williams still working full time, correct?

A Uh-huh.

Q And now we have Teece still working four [154] days a week, right?

A Right.

Q And we have one other person coming in two to three days a week; is that correct?

A Uh-huh.

Q And we have no LPN?

A Yes.

Q Calling your attention to Plaintiff's Exhibit 164. We go to a year later, to September, let's say — no, October, October, 1990. We go to third shift. Was there any full-time LPN working in that year, in November of 1990? There was a LPN that came in two days in the entire month, though; is that correct?

A According to the schedules, yes.

Q As far as the number of nurses working on third shift, we had again Williams working — well, almost full-time. She was gone for something and then we had some other people. So basically we had two people there per night; would that be fair?

A For the most part, yes.

Q Now. I understand you never saw this proposal before. But if this proposal, as indicated

* * *

[167]

time. But when I was there she also worked as house supervisor on the weekends and had accountability for the entire institution. So significant management experience in that respect.

Q In the proposal that you were shown that represented Sue Gulley's proposal, just to make this absolutely clear, if what was proposed by Sue Gulley — either orally or in that written form — as long as that did not exceed her budgeted FTE's, is did not require your approval; is that correct?

A Correct.

MR. DAVIS: That's all I have. Thank you, your Honor.

THE COURT: Mr. Harvey?

REDIRECT EXAMINATION

BY MR. HARVEY:

Q The way Sue Gulley came to you concerning this necessary change that she felt had to be implemented in November, December of 1988, did she bring any numbers or did she show you any numbers of the increase in patients coming in in a.m. admissions?

A I don't believe that she showed me any numbers. We may have discussed it, but I don't [168] remember seeing anything on it.

Q And this is part of Exhibit 164 and it is the staffing sheet for Four-C in December, 1990. Are there any full time — are there any LPN's working?

A No. This is a schedule of them, not the staffing sheet.

Q That is the schedule. This is the way the floor is going to operate unless something comes up?

A True, but we do make adjustments that we don't reflect here.

Q But there is no LPN shown here as scheduled; is that correct? There are two RN's scheduled per night; is that correct?

A Yes, sir.

MR. HARVEY: That's all.

MR. DAVIS: That's all I have, your Honor. Thank you.

THE COURT: Thank you.

(Witness excused)

MR. DAVIS: Off the record, your Honor?

THE COURT: Yes.

(Discussion had off the record.)

THE COURT: Joint Exhibit No. 1 will be

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[206]

about, who came to you about moving from Four-C to Four S?

A Susan Gulley.

Q Who was Susan Gulley?

A She was the head nurse, at the time, of Four-Southwest.

Q Or Four-South?

A Right. Well, it would be Four-Southwest because Jenny Clyatt was actually the nurse that was going to be the training

nurse for the Four-South. So it was Susan Gulley who I was under at that time.

Q And she came — Susan came to you and said what?

A Told me that I was being transferred to Four-South and that she had asked all the other nurses on the floor and that I was the one with the least seniority — at that time was five years — and so, therefore, I was — I had to go.

Q And when she said the "least seniority," was that seniority on the unit or seniority within the hospital?

A Seniority on the unit.

MR. HARVEY: That's all I have, your Honor.

[207]

THE COURT: Mr. Davis?

CROSS EXAMINATION

BY MR. DAVIS:

Q You went to work at Proctor in that year?

A 1983.

Q And that was Four-Southwest at the time?

A Yes, uh-huh.

Q And were you there on Four-Southwest continuously until 1988?

A Yes.

Q And that's when Sue Gulley told you that she wanted you to go to the Oncology unit?

A Right.

Q So in fact you had been a nurse at Proctor for five years and as a nurse on the unit for five years?

A That is correct.

MR. DAVIS: That's all I have. Thank you.

THE COURT: Anything further, Mr. Harvey?

REDIRECT EXAMINATION

BY MR. HARVEY:

Q Did you ask if someone else could go?

A Yes, I did.

[208]

Q And that is when she said, "No, you are the one because you have the least seniority on the unit"?

A That is correct.

MR. HARVEY: That's all.

MR. DAVIS: Thank you, your Honor.

(Witness excused.)

THE COURT: Step up and be sworn, please.

CAROL ROPER,

having been first duly sworn, was examined and testified under oath as follows:

DIRECT EXAMINATION

BY MR. HARVEY:

Q Would you state your name?

A Carol Roper.

Q And you were born on January 15th, 1949?

A Yes, sir.

Q And you went to work — you went to work at Proctor first when?

A August, '70, 1970.

Q And what did you go to work as?

A I was a nurse's aide.

Q And you were a nurse's aide from when to when?

[209]

A 1970 to 1976, July.

Q And when did you become an LPN?

A July of '76.

Q You said '76? I'm sorry?

A Uh-huh.

Q And then did you apply for a position at Proctor as an LPN?

A Yes, sir.

Q And I show you your — what is marked as — I don't have it marked. Show you Plaintiff's Exhibit No. 160, and is this — I will ask you if you recognize that.

A Okay.

Q What are those?

A Application for employment at Proctor.

Q And this is your application. It is dated 12-3-76; is that correct?

A Yes, sir.

Q And that is your application for employment as an LPN?

A Yes, sir.

Q And I show you the second part of Plaintiff's Exhibit No. 2 and ask you — in your [210] deposition — that is your application at Proctor for employment; is that correct?

A Yes.

Q As an aide?

A Yes.

Q What is the date of that?

A August, '70, August 4th.

Q And where did you start working at Proctor as an LPN?

A Four-Southwest.

Q And that was under Sue Gulley? I mean — I'm sorry. Is it Sue?

A No.

Q Who was that under?

A Helen Gapp.

Q Oh, all right. And when the floor split in 1988 did you go to work on the Four-C side or the Four-S side?

A I belonged to the Four-South side. I came to Four-South as an Oncology nurse.

Q So you were working on — when the floors split you went to the Four-South side?

A See I go back before that. So I was [211] originally brought to fourth floor as part of the Oncology staff.

Q So all those years --- from 1976 all the way up to 1988 — you worked on the Oncology —

A No, sir.

Q You worked where?

A Part of the time I worked on Four-Southwest, and then when Oncology opened, which I don't remember the year of that, I transferred to Oncology.

Q So the first time Oncology opened you started working there?

A Uh-huh.

Q Do you have an idea of when that might be?

A I would say it was probably '79. I'm guessing.

Q And so that I understand it, you were working from '76 to '79 South Four —

A Four-Southwest.

Q Which was surgical — medical-surgical floor?

A Yes.

Q And then in '79 when the Oncology [212] department opened up you went to work there?

A Yes, sir.

Q And is there a difference between the Oncology floor and Surgical floor?

A Some, yes, sir.

Q And did you — from '79 through May of 1988 you continued working on the oncology section?

A Yes, sir.

Q Somewhere in 1987 is when it became Four-S, the Oncology section, correct?

A Yes, sir.

Q How did you happen to go to work on the Oncology section? Was it posted in 1979 and you decided to go or how did that come about?

A I was aware — made aware of the floor being established and wanted a chance at that type of nursing.

Q And why did you want to do that type of nursing?

A I had been doing a lot of it already on Four-Southwest. We were taking care of a lot of oncology patients at that time and, really, liked that type of nursing.

[213]

Q How is that different from doing, let's say, surgical type of nursing that you would have done on Four-Southwest?

A Well, we still did surgical nursing but it was of cancer patients, plus we took care of people having chemotherapy. So you needed to know your drugs, your chemotherapy drugs, and we also took care of the terminally ill.

Q Knowing the chemotherapy language, that was something you learned in the Oncology Department; is that correct?

A Yes.

Q Did you have any special training learning that?

A Yes, sir.

Q And was that done at Proctor or anywhere else?

A Yes, sir, and we took outside workshops.

Q While working on the Oncology floor?

A Yes, sir.

Q So in 19 — May of 1988 — let me ask this question because I think it's a little unclear from earlier testimony.

[214]

You were working on the Oncology floor and it became Four-S. What was the Oncology section number before it became Four-S?

A It was Oncology. It was actually Three-West, what it Three-West now.

Q It wasn't a part of Four-Southwest?

A No.

Q It was a whole different number?

A Right, correct.

Q And it moved from the third floor up to the fourth floor?

A That is correct.

Q The whole unit — every unit moved from the third floor up to the fourth floor, correct?

A Yes, sir.

Q And you stayed with the Oncology unit?

A Yes, sir.

Q And while you were in the Oncology unit over all those years, what shift did you work?

A Days, swing. You never worked a straight day shift. You always covered the other shifts when it was necessary.

Q But did you work one shift more than **[215]** others?

A Probably seven to three.

Q So you were primarily a daytime nurse and then you floated to other shifts?

A Yes.

Q When the need arose; is that correct?

A Yes, sir.

Q In May of 1988 do you recall moving?

A Yes, sir.

Q Who told you you had to move? Anyone come to tell you you had to?

A You mean moving?

Q From Four Oncology — Four-South to Four-C?

A Yes.

Q Were you ever told before that year 1988 that you had to move anywhere?

A Oh, other than we moved from Three West to Four-South.

Q Well, you were told you had to do that?

A Yes.

Q And the whole unit moved, though?

A Right.

Q But the PCC moved and the other nurses **[216]** moved? Everyone moved, right?

A (Nodding head.)

Q You have to speak up to answer, so he can take it down.

A Yes.

Q So then the whole unit that used to be on the third floor in 1977 moved up to the fourth floor, where you are working and then in 1988 you are PCC, too?

A I am both.

Q How about May of 1988?

A Jenny Clyatt.

Q Was Dianne Birds there before that?

A Yes.

Q When did Dianne Birds leave?

A Maybe that spring or the fall before. It wasn't too long before that.

Q But then you got an [sic] another new PCC?

A Yes.

Q Jenny comes in this May of '88 and you are doing your job in Oncology, and does she tell you anything?

A That due to staffing, I was going to be [217] moved to the other side, to Four-South, Four-Center.

Q And did you volunteer for this or did you not want to move?

A Oh, I probably at the time did not want to move, but it was done fairly. So the girl that stayed had more seniority than I.

Q And she had more seniority and she had been at the hospital long or on the floor longer?

A In the hospital longer.

Q How long had she been in the hospital?

A Twenty-five years or longer.

Q And Jenny, had she been an LPN the whole time?

A Uh-huh.

Q And she had been an LPN the whole time?

A Yes.

Q And did you object to being moved?

A Probably. I don't remember exactly, sir.

Q Did you have a conversation with Jenny about who was going to move, whether you or the other girl?

A I was probably told and that was fine. I was probably told and that was all there was to it.

[218]

Q And where do you work today?

A I work on Three-South, Pediatrics.

Q And let me ask when she told you did you ask her what the basis was of seniority?

A Oh, I don't know if I did or not.

Q All right.

A Because I know that in the past in my transferring that it's been in-house seniority.

Q So you believed that there had been an house seniority — or hospital seniority forever at the hospital; is that correct?

A As long as I've been there, sir.

MR. HARVEY: Thank you.

MR. DAVIS: No questions, your Honor.

THE COURT: Thank you. You are excused.

(Witness excused.)

MR. HARVEY: We're done for the today.

THE COURT: Let's start promptly at nine and see where it takes us.

That deposition, would it be helpful if I read that before tomorrow?

MR. HARVEY: I think it is. Well, Roy may not, but I think it is.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

91-CV-2256

HELEN J. BYBEE,
Plaintiff,

vs.

PROCTOR COMMUNITY HOSPITAL,
Defendant.

VOLUME TWO OF TWO

BENCH TRIAL

Thursday, October 8, 1992
Morning and Afternoon Session.

BEFORE:

ROBERT J. KAUFFMAN,
MAGISTRATE JUDGE.

PRESENT:

R. WAYNE HARVEY and AMBROSE V. McCALL,
(Harvey & Stuckel)
900 River Valley Plaza
Peoria, Illinois 61602,
on behalf of the plaintiff;

ROY G. DAVIS and ROBERT RIFFLE,
(Keck Mahin & Cate)
640 River Valley Plaza
Peoria, Illinois 61602,
on behalf of the defendant.

George R. Kozuch, C.S.R.

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[238]

not recall.

Q So the switch was made?

A Yes, sir.

Q And you continued basically with the same staffing from May of 1988 till, let's say, October of 1988; is that correct?

A Yes, sir.

Q Let me show you what if Plaintiff's Exhibit 136.

MR. DAVIS: Is that the working proposal?

MR. HARVEY: Yes, sir.

MR. DAVIS: Your Honor, there will be a series of questions about this. We have an extra one that we might give the Court a copy to follow along.

THE COURT: Thank you.

MR. DAVIS: That's marked as Defendant's 4, but it is the same as Plaintiff's 138.

THE COURT: 136.

BY MR. HARVEY:

Q This proposal you wrote prior to instituting any changes on Four-C; is that correct?

A Yes, sir.

Q And you wrote the proposal somewhere around [239] September of — October of 1988; is that correct?

A Yes, sir.

Q Do you recall giving this proposal to Mary Jane or Jan McCoy?

A I dod [sic] not recall that I gave it to them. I recall discussing it.

Q You prepared this proposal for Mary Jane, you testified; is that correct?

A Mary Jane and for myself.

Q What?

A And for myself. The change is on paper.

Q For yourself and for Mary Jane?

A Yes, sir.

Q And it was done to justify your changes; is that correct?

A Yes, sir.

Q And she approved this change in 1988; is that correct?

A Yes, sir.

Q And she also approved — and there is a line here "Interim change." She also approved the interim change that occurred; is that correct?

A When we say "she approved," I know that she

* * *

[241]

Q By recent," what do you mean?

A Since I had been on the floor, since '83.

Q Well, she had come well after that, correct?

A I believe so.

Q And —

THE COURT: Before we leave that, may I interrupt you just a second? I am not sure I got the date as to when this was written. Do you know?

MR. HARVEY: I asked her if it was September, '88 and she said yes.

THE COURT: That's what she said, that's what I meant. Okay, go ahead.

BY MR. HARVEY:

Q Now, the effect of this proposal was something more than — am I correct — than just to move an LPN from the night — from the day to night and an RN from the night to the days; is that correct?

A It had more things involved than that, sir.

Q This proposal required an increase in the total FTE's of approximately two and a half full-time equivalents; its that correct?

A Yes, sir.

Q And that is a rather substantial increase, **[242]** isn't it?

A I was an increase from the present staff.

Q Well, would you call it rather substantial?

A I don't know that I would use that term.

Q Page 51, line — started at line 17, "And it actually shows an increase of two and a half FTE's"?

Your answer is, "Uh-huh."

"If you add it all up — by the way —"

Your answer is, "Uh-huh."

"That is a rather substantial change, isn't it?

And your answer is, "Yes, sir."

Do you recall that answer?

A If that is what was in the deposition, that is what was said.

Q And you still agree it's a substantial increase, two and a half FTE's?

A It's an increase.

Q At the time in 1988 you had 20 people working on your floor; is that correct?

A Approximately.

[243]

Q Not only RN's, LPN's and nurse's aides and unit secretary, a total of 20, and you add two and a half FTE's, that is approximately two and a half people, correct?

A Yes, sir.

Q So you were having an increase of approximately ten percent, right?

A Yes, sir.

Q Now, this proposal that you are having and you gave — well, that you are going to give or show or — show Mary Jane and Jan means that the FTE's, the full time equivalents, on third shift remain the same; is that correct? You add up the present staff and you go to the proposed staff, it is 6.8 FTE's; is that correct?

A Yes, sir.

Q And if you add up the changes for the third shift, you started out with 4.5 FTE's and you ended up with 5.1 FTE's; it that correct?

A Yes, sir.

Q The other shift that you are having an increase, or a shift that had the primary increase, is second shift; is that correct?

[244]

A Yes, sir.

Q And that goes from 5.1 to 7 FTE's; is that correct?

A Yes, sir.

Q And I note there is a little change here on the LPN. Originally looked like 1.6; is that correct?

A Yes, sir.

Q And it was changed to 1.5; is that correct?

A Yes, sir.

Q The reason for that change from 1.6 to 1.5, when you were doing this proposal, is because Dorothy came and said, "I want to work one less day every two weeks"?

A Yes, sir.

Q So the sole reason that you wrote the staffing requirements of the LPN was at the request of Dorothy Hipp, the part time LPN on third shift, coming to you somewhere in September, I would guess, or October saying, "I want to work one less day every two weeks"?

A Yes.

Q If it is — so the Court understands, just to shortcut the pain to figure it out —

[245]

MR. DAVIS: The answer is yes, I think the Court understands that.

BY MR. HARVEY:

Q 1.6 she worked three day — three days every week for two weeks, would that be right?

A No.

Q I understand it, but we will leave it. Anyway, she requested this change and you went along with it, right?

A Yes.

Q Now, the reason for instituting this change in September, October, 1988 was that your night shift was made — possibly for having patients come in and having the admission of those patients; is that correct?

A That was one of the reasons, yes.

Q And the night shift was taking on more responsibility; is that correct?

A Yes, sir.

Q And you needed more people on third shift; is that correct?

A Yes.

Q And also you felt that the night shift had [246] become more responsible and needed more reinforcement; is that correct?

A Yes, sir.

Q And by more "reinforcement," you meant that it needed more people; is that correct?

A Yes.

Q And that is the reason you were going to send Helen on the night and increase the number; is that correct?

A And balance the mix.

Q Did you ever — you stopped being PCC in — somewhere in middle of '91, is that correct, when you changed positions?

A Our floor transferred to another unit.

Q And you became PCC of Three-West — or Three-South Ped?

A Three South.

Q When was that?

A I'm sorry?

Q That was when?

A When?

Q Yes.

A That would have been in May of 1991, I think

* * *

[250]

September on second shift; is that correct?

Here I'll show you. Here's Atwater on first shift and here's the second shift. Isn't that them?

A This is them and this would have been starting November 27th.

Q Yes, the months of December, basically November 27th to December 24th?

A Yes.

Q Am I correct you had the, after spending a month on orientation on first shift you had them working?

A Second shift.

Q Second shift?

A Yes, sir.

Q Now, on third shift the object was to increase, according to your proposal, increase the number of people; is that correct?

A To increase the number of people and balance the staff mix.

Q And in October — I'm talking about October 2nd through October 29th, according to the staffing schedule you had basically three RN's, two to three [251] RN's working each night; is that correct?

A Yes, sir.

Q And in December, 1989, when you implemented this proposal and wanted to increase the staff Helen resigned?

A Yes, sir.

Q And you only had two RN's basically working each night on the third shift; is that correct?

A Yes, sir.

Q Did you ever fulfill the — ever full the full-time LPN's slots?

A Not with an LPN.

Q I show you the — this is 154, Roy.

MR. DAVIS: What is it? What date?

MR. HARVEY: Well, first I will have November, December —

MR. DAVIS: Those are 1990?

MR. HARVEY: Yes.

THE COURT: What is the number?

MR. HARVEY: The Exhibit No. is 164, your Honor.

Q I show you the staffing proposal for third shift in 1990; is that correct? Right?

[252]

A That is what the staffing was in 1990?

Q Yes, the staffing in 1990, and at that time you had two LPN's — two RN's working full time, correct?

A Uh-huh.

Q And no LPN's; is that correct?

A Yes.

Q And the same would be true for the month of October, except you had Dorothy Hipp there for two days, correct?

A Ever [sic] other weekend, yes, sir.

Q Did you tell Dorothy Hipp she had to work that shift every other week?

A Dorothy Hipp had wanted every other weekend position and that's the position that was open for every other weekend.

Q So Dorothy Hipp came to you, the LPN working for you on second shift and said, "I no longer want to work this month. I'd like a position every other weekend."

And you said, "Well, you can work every other weekend so I will — you can do the third shift"?

[253]

A That's where the opening was.

Q Now, in choosing Helen Bybee you required — would it be fair to say that you required Helen Bybee, in November of 1988, to either to go work third shift or not work at all for you?

A I had no other LPN opening.

Q So if she didn't go work third shift, there was no other opening for her; is that correct?

A Correct.

Q And the reason it had to be Helen Bybee and not Dorothy Hipp or anyone from another floor such as Cathy McCartney, Four-S was because you were in need of a full-time LPN; is that correct?

A I posted a full-time LPN, yes.

Q You needed a full-time LPN?

A Yes.

Q It couldn't just — this need that you perceived in September, October of 1988 could not have been fulfilled with part-time work — part-time LPN?

A I had not explored that option.

Q And you had not explored it or you had — you never thought about it, is that what you are saying, or you decided that it couldn't be fulfilled [254] with a part-time LPN?

A I decided it was a full-time LPN that we were looking for for that position.

Q And you had excluded the ability of a part-time LPN to handle that position; is that correct?

A Yes.

Q Helen Bybee was never offered a part-time position on second shift, is that correct, by you?

A As an LPN?

Q Uh-huh.

A No, sir.

Q Helen Bybee was — do you recall whether there was a Jenny —

A Clyatt.

A — Clyatt? You don't recall whether she was offered any position on her floor, is that correct, part time for full time.

A I do not know.

Q By the way, Combes and —

A Schwigen.

Q — yes, Schwigen, how old are they about?

A Twenties.

Q Somewhere in their 20's, right?

* * *

[256]

* * *

Q So what I'm saying is your proposal — looking at your proposal on line three there at the [257] bottom, you never did meet the number of people on third shift that you proposed?

A Correct.

Q Would it be fair to characterize Helen's attitude when having to leave Proctor as being distressed.

A Yes.

Q It was not something — a job — that she was giving up willingly?

A Yes.

Q Did you know the reason Helen couldn't work third shift?

A She had indicated to me that it was her son.

Q And in working with her for the five or six years before you became PCC, or five years before you become PCC, you had heard about what happened to her son?

A Yes, sir.

Q You had some time to communicate during the day?

A Yes.

Q And it was as a result of an automobile accident?

* * *

[291]

question. Whether she chooses to answer it yes or no is something else.

THE COURT: Repeat the question, Mr. Harvey.

MR. HARVEY: Please, repeat it.

(Question read.)

A There is a change in the a.m. admits, yes.

Q There is an increase?

A Yes, sir.

Q Did you ever provide anyone with the numbers showing that increase in a.m. admissions?

A No, sir.

Q Anyway, you've got a four-month period, approximately, correct?

A Yes, sir.

Q And Carol Roper, when she came over you had no objections that you voiced to anyone as to the LPN on your floor?

A Yes, sir.

Q And you thought you could adequately handle what was going on on your floor, correct?

* * *

[299]

excused.

(Witness Excused.)

THE COURT: Mr. Harvey?

SHIRLEY SUITS

having been first duly sworn, was examined and testified under oath as follows:

DIRECT EXAMINATION

BY MR. HARVEY:

Q State your name.

A Shirley Suits.

Q And when were you born?

A 1938, June 22nd.

Q And where are you presently employed?

A Eureka Hospital.

Q What did you do?

A Ambulatory care coordinator.

Q Tell us what that means.

A Well, in includes managing the department, and patient teaching and patient education and discharge planning and on-hands nursing.

Q Do you have any people under you?

A Yes, I have four.

Q Now, how long have you been in that position [300] at Eureka Hospital?

A I think probably about three and a half years.

Q And what year would it be that you started there?

A I started in April of '88.

Q In March of '88 where were you employed?

A At Proctor Hospital.

Q When did you go to work at Proctor Hospital?

A The first time I went to work there was in 1961.

Q And what did you go to work as?

A As an RN on 3 to 11 shift.

Q And how long did you work the 3 to 11 as an RN at Proctor Hospital?

A Well, I had to quit Proctor in 1964 because by husband had a terrible accident, and then I went back to Proctor in 1966.

Q What position did you hold?

A Again on the 3 to 11 shift, and I am not sure, but I think that I probably worked 3 to 11 about four or five years. And then I got — when my daughter went to first grade — she was the youngest

* * *

[303]

that I would give it a try.

Q So from 1979, then you were the nurse manager of PCC of Four-Southwest, is that correct, which became Four-C?

A Right, it became —

Q When did it become Four-C?

A Well, the floor was split in June of '86, when it was initially split.

Q And before it was — what kind of floor was it before, Four-Southwest, what kind of patients?

A I had surgical, mostly pre and post-surgical patients, and Four-South was Oncology.

Q And from 1979 through 1988 did Helen Bybee work for you?

A Yes.

Q During that period of time did you know anyone to have voiced any criticism or any complaints about the care that she had rendered?

A None. The opposite.

Q What do you mean by "the opposite"?

A Well, it was mostly praise. The RN's depended on Helen a lot.

Q What do you mean "the RN's depended on Helen

* * *

[309]

would be.

And I do know that she called me in and told one physician that he needn't worry that I wasn't going to be leaving, that I was going to stay right on the unit.

A Now, did something occur after that?

A Yes, the salary was quoted to me on a Friday and on Monday when I returned to work —

Q This is March, 1988?

A Yes. When I returned to work on Monday I was coming to the nursing office, and when I went down there Mary Jane and — was in Jan McCoy's office along with Susan Gulley —

Q What occurred?

A And Susan Gulley stated that she did not want me to work on the unit. That she did not want me to use her as a crutch.

Q What you mean "as a crutch"?

A Well, I thought a lot about that after I was gone. And I'm a thinker and I think people who need crutches, or other walking aides, either have disability or are elderly. And I knew I didn't have disabilities. I probably had 65 accumulated sick days [310] when I left there. So I hadn't been off for anything. So she must be referring to my age.

Q And what happened after she said that?

A Well, then my position on Four-Center was gone. So there was not any position available for me at Proctor.

Q Did anyone come to you about — did anyone come to you about working anywhere else at Proctor Hospital?

A Well, I went through the grievance procedure.

Q And who did you file it with first?

A I first filed it with Mr. Franks.

Q Did you have a meeting with him concerning that grievance?

A Yes.

Q When was that, approximately?

A Well, this whole process of eliminating Shirley only took three weeks, and it must have been probably the middle of March that I filed the grievance. And I believe Mike did not call me. I had to call him from home to ask if he was going to talk to me.

[328]

A I would have been, say, '51 to — '50 to — wait a minute. '60 to '65.

Q And after John was born in 1966, when did you first return to work?

A When he went to kindergarten, my third oldest son had just graduated and he said that he would stay home with John to get him off to school and to make sure someone was there so I could go back to school for Nursing. I had always wanted to do this.

Q And did you go back to school?

A Yes, I went to I.C.C.

Q When did you go to school for Nursing?

A I went in 1970 and took several courses to make sure I could do the job because I had been out of school for many years.

And then I did well in those, so I went full time then in '71, which was 15 college hours a semester, plus the summer.

Q And what did you graduate as?

A As LPN.

Q Where did you go apply for a job?

A Proctor Hospital.

Q And what were you hired as?

[329]

A An LPN.

Q What shifts were you hired?

A I worked third shift.

Q Do you remember where?

A Four-Northeast was by base but I floated all over the hospital. I worked every unit there, except the emergency room. Was just occasionally to do a certain job. Maybe insert a catheter or something, if they were swamped with patients.

Q And then after those first couple of years did you end up going to work somewhere?

A Yes, an opening had been available on Four-Southwest.

Q What shift?

A Third shift.

Q And Four-Southwest, right?

A Yes.

Q And what year was that, about?

A It would be maybe '74.

Q And how long — you went to work third shift and how long did you work third shift on Four-Southwest?

A Six and a half years.

[330]

Q And what happened then?

A Then an opening became available on days. I asked for it and Helen Drapp (phonetic) was the head nurse. As she says, "Well I guess you will have to be able to take it because you have more seniority on the floor."

Q And then did you go to work third shift?

A I went to work first shift.

Q From what year?

A I believe 1974.

Q From 1974 through 1988 did you work first shift in Four-Southwest which later became Four-C?

A Yes.

Q Did you work other shifts on occasion?

A Yes.

Q How would that come about?

A Vacation time, or someone was ill or something, they would ask or they would schedule you to work. We had 3 to 11 or 11 to 7.

Q From 1974 to November 1988 were you ever reprimanded, suspended, criticized at your job at Proctor Hospital?

A No, never.

[331]

Q Did you receive any type of recommendations or compliments as far as your job?

A Yes, I received so many I can't give you numbers. They had a — yes, they had a thing that patients fill out. I had gotten a few of those. And on my evaluations it was always comments that I was an asset to Proctor Hospital. I did an excellent job.

Q How long were you, if you remember, the only LPN on first shift on Four-Southwest, Four-C?

A When the floors split.

Q So prior to the floor splitting there was another LPN on the first shift?

A Yes, I believe so.

Q And who was that, if you remember?

A Vickie, I believe her name was at what [sic] time, Skeese. Carol Roper was there part of the time. I can't remember all of them.

Q But when the floor split you were the only one left as an LPN; is that correct?

A Right.

Q From the time the floor split, as you heard it was somewhere around '86 to November -- October, November 1988 — strike that.

[332]

In 1988, while working on the floor, did you notice — notice any change, substantial change, in the admissions in the —

A No, I did not.

Q Were you asked by either Miss Suits or Mrs. Gulley — Miss Susan Gulley to perform any other different types of tasks or come in earlier to perform any other different types of tasks because of what was going on?

A No.

Q Do you know what the a.m. admissions are?

A Yes.

Q And how long had a.m. admissions been going on?

A I can't give you dates. Several years.

Q And what is an a.m. admission?

A They come in — usually around six o'clock — to get prepared for surgery; and then they come back either as a first or second shift.

Q And did you do any work with a.m. admissions?

A When I had worked the second shift — no, it wasn't the second shift. I just don't remember which [333] ones. I know I had worked with them but I can't tell you dates or whether it was third shift. I might have swung some. I am not sure.

Q Besides your regular shift work were you dealing with a.m. admissions?

A Yes, we had some coming in at seven or eight o'clock that would be going to surgery maybe at ten or eleven.

Q Some came in at six, seven?

A Right.

Q And what would you do?

A I would do the initial admission, which would be to take their blood pressure, temperatures, get their history. I was not allowed to do the physical assessment. That had to be an RN. She had to do the nursing care plans. I was not. Other than that, I did the rest of it.

Q And could you — was there any particular nurses that you worked with that were doing that?

A Whoever they said would be my co-worker for the day.

Q Do you remember the circumstances when Carol Roper came to work on the floor?

[334]

A I don't know the circumstances. I just knew that she came to our floor and Amy Mauschbaugh went to Four-South.

Q Did anyone ever tell you why that occurred?

A No. I assume they needed her.

Q Was there any change in your job duties when Carol Roper came to the floor?

A No.

Q Did anyone — did you notice any problems of people being admitted to the floor after Carol Roper came out there?

A No.

Q Did any say that or tell you that there is a problem arising from May to, let's say, the beginning of October as a result of Carol Roper being on the floor?

A No.

Q Did Sue Gulley ever come to you and say, "Well, there is a problem, Helen, about you handling any of the admissions," or "there is a problem, Helen, with the way this is working out"?

A No.

Q When were you first informed, and by whom, **[335]** that there had to be a change made and someone had to go to third shift?

A Sometime in November, I believe, Susan Gulley called a meeting of all the LPN's and said that one LPN had to —

Q Tell me who all the LPN's are?

A Mary Persak, Carol Roper, myself, I believe Dorothy Hipp was there but I cannot say for sure on her.

Q And what did she say?

A She said an LPN had to go to third shift and she wanted volunteers. And I said, "I cannot work third shift."

Mary Persak said that she had too many animals at home to be let out, and Carol said, "I don't want it." And that was it.

Q Did she give you a reason or state the reason why she said a nurse — an LPN had to go to third shift at that time?

A I have to think. She mentioned nursing . . . but I can't tell you word for word what she said.

Q And after this particular meeting that no one volunteered for the various reasons they gave, **[336]** what occurred then?

A She said, "Well —" I can't remember exactly what she said. But I said, "Well, I have seniority. So I don't think I should have to go."

I never, ever mentioned in-house seniority because I didn't know what in-house seniority even meant and I had been there for 16 years.

Q Who mentioned that?

A I don't think that was ever mentioned at that meeting.

Q What occurred next then?

A Then I don't know how long after that she called me in.

Q Who is "she"?

A Sue Gulley, and she said, "We have decided you will be going to third shift."

And I said, "It's impossible for me to work third shift. I will gladly go part time, anything to stay on days. I can do, you know, 3 to 11 at times but mostly on the weekends." That I would be willing to do that. Because I would not let my son regress by me not being there.

[337]

Q Now let's go to — is this when she mentioned in-house seniority?

A Yes.

Q And what did you say when she said that?

A I told her I never heard of in-house seniority. It's always been floor seniority. That's how I got day shift.

Q Tell us about your son and why you couldn't go to third shift?

A My son was —

Q John is that?

A John, youngest son, he was rear-ended by a drunk driver. He was in a coma for a — a deep coma for about four and a half months.

Q At St. Francis Hospital?

A St. Francis, and then we brought him home, he was still semi-comatose. That was September the 15th of '88. Then he didn't come out of that semi-coma stage until approximately April or May until he started to responding some.

Q Let me ask, in April or May of '89?

A Yes.

Q So from September, October, November what

* * *

[339]

home?

A Over a year before they were taken out. I can't give you a date on that, because he also had the continuous oxygen going to the trach.

Q How long did that continue?

A That continued until — I would say — the fall of '88.

Q Who provided the care for him while at home?

A Myself, my husband, and my one son did a lot and then I had a girl come in during the afternoon that had retired from Proctor as an old LPN, and she took care of John between the time my husband left for work and I come home.

Q Tell us the schedule that you were keeping concerning John in 1988, taking care of him and how you were making this accommodation to his care at home?

A I was mainly the care giver. I mean I cleaned his feeding tubes, I did all the wounds, care around it, sectioned [sic] his trach, all of this.

I got up every night every two hours, turned him so he could not get any bed sores. I did everything plus his — his physical therapy.

[340]

I had an alphabet board so when he finally came out of the coma that we could try to communicate.

Q And let me ask this: when did he come out of the coma?

A This was at the end of April or first of May.

Q Of 1988?

A Yes.

Q Could he verbally communicate?

A No.

Q Could he verbally communicate today?

A Few words. We're working on it. He's using an alphabet board.

Q How does he do that?

A He spells out the words.

Q By pointing to them?

A By pointing to them.

Q In 1988 from January through October, November, could he get out of bed?

A No. Only if we lift him.

Q But I mean —

A No by himself, no.

[341]

Q How would he go to the bathroom?

A We had to help him go. I mean the urinal, he had a catheter for a long time, what they call a Texas catheter. It is not an insertion.

Q Who at the hospital had you communicated the problem of John to?

A I think everybody knew, you know, including a lot of the doctors would ask how he was doing and he was progressing. Because nobody ever thought he would ever come out of the coma.

Q Did you ever discuss that with Sue Gulley?

A Oh, yes.

Q Tell us why it was that you could work first shift and even sometimes second shift but you could not work third shift?

Q First of all, my husband was hard of hearing and he was not in the best of health either. And he cannot hear John.

We had rigged up a bell hanging from a string by his bed and he had to have it right close to his hand and that he could move a finger or to hit this bell to call you if he had to go to the bathroom, or if he was uncomfortable or something like that. [342] And my husband could not hear it.

* * *

[344]

list, which I'm sorry I didn't bring — of some people like the hospital gives you a list. And I had called several and they said

it was not feasible to come out for several hours because I live in Rome, Illinois and that is out of town.

To hire a full-time person to be there, with the trach and feeding tubes, it would have cost me more than I made.

Q Now, let's go back to October, November and Sue Gulley tells you you have to move to third shift. Did you have any discussion with her concerning any other position at Proctor Hospital?

A I told here I would go part time or work anywhere if I could stay on days.

Q And what did she tell you?

A She said, "At your rate you have no options. You will go to third shift."

Q Did you file a grievance?

A Yes, I did.

Q And who did you file that grievance with?

A The first one I filed, according to the handbook, to Mike Franks.

Q And did you have a meeting with Mr. Franks?

[345]

A No, he called me on the telephone after I filed the last procedure, which was to Norman Laconte and he told me on the telephone —

Q So you filed two grievances. First to Mike —

A Right.

Q But you never got a response?

A No, not until after the second one.

Q And what happened — and the second one Mr. Franks called you on?

A Right.

Q And what did he tell you and what did you tell him? Was this on the phone?

A On the telephone.

Q And do you know approximately when that was?

A No, I don't. And he told me he was sorry, that he was sorry he hadn't gotten back to me before I wrote the letter to Norman Laconte, and that there would be possibly a unit secretary position coming open on days but I couldn't have it because the second shift would have first choice, because she had been there the longest.

Q Did he offer you, or did you ask for, any **[346]** other type of position at Proctor Hospital?

A He did not offer me anything.

Q And did you have any further discussion with him concerning the reasons you couldn't have a position at Proctor Hospital?

A When I went back to sign up after I had left for my retirement.

Q What you mean you "went back"?

A The first two nights I was scheduled on 11 to 7 I tried to find somebody. I could not find somebody —

Q Wait, wait, stop. You were scheduled for 11 at the end of November 27th, 28th — or 28th you had not quit yet —

A No.

Q — or resigned. Were you going to try to work?

A Yes.

Q What happened? Tell us what you tried to do.

A I called in and said I could not find someone to stay with John, I could not work that night.

[347]

Q Who did you call?

A I called the second shift supervisor, in-house supervisor.

Q And this happened for two nights in a row?

A Yes.

Q Then what did you do?

A It was impossible for me. So I called Kay Angel and told —

Q Who is Kay Angel?

A She is the scheduler, I guess you would call her. She scheduled people on the floors. You know, she is a nurse's aid and a secretary. And I told her that I would have to retire. I could not do it, and I would not leave John alone. Basically he would be alone, which is bad because he couldn't hear him.

Q So what did you do then?

A The she said she understood, she would pay me for all the — my benefits, my vacation, whatever. And I went to Mike Franks.

Q Approximately what date?

A I can't tell you. It had to be, I would day, December, sometime in December.

Q How did that meeting that you went to go see [348] Mr. Franks come about?

A I felt Mr. Franks was very uncomfortable.

Q No, listen, how did it come about? Did you call him or did he call you?

A I don't recall whether he called me to come in or I called and said I would be in. I don't recall.

Q So you went into his office at Proctor Hospital?

A Yes, yes.

Q Did you meet with him?

A Yes.

Q And when you did meet with him where did you meet with him?

A In his office.

Q Who was present?

A Just him and I.

Q Did you have a discussion with him at that time?

A Yes.

Q Tell us what the discussion was.

Q He showed me how much I would get for retirement, and I made a comment, "After 16 years [349] that's really insulting."

I might not have used that particular word but that is what I felt. And I went ahead and signed the papers. And I told him then it was terrible to get rid of these people just because

we're getting older. And he says, "I hope this isn't happening at Proctor."

Q And what else?

A And I walked out.

Q How long was the meeting with Mr. Franks?

A I don't recall.

Q At the time you were at Proctor in 1988, do you know what you age was in relationship to the rest of the LPN's?

A I think I was one of the oldest ones in the hospital.

Q Did you want to quit?

A Oh, no. I loved my job.

Q Since leaving Proctor have you worked anywhere else?

A No.

Q And since leaving Proctor have you — one moment. I'm going to show you what is Plaintiff's

* * *

[355]

AFTERNOON SESSION

THE COURT: Thank you. Be seated, please. Does the plaintiff have anything further?

MR. HARVEY: I would like to offer into evidence our exhibits here.

THE COURT: I have one. I think this is your exhibit.

MR. HARVEY: Plaintiff's Exhibit No. 1 is the employees handbook.

MR. DAVIS: No objections to that, your Honor.

(Plaintiff's Exhibit No. 1 was received in evidence.)

MR. HARVEY: I don't know what order. Plaintiff's Exhibit No. 12, your Honor.

MR. DAVIS: Plaintiff's Exhibit No. 12 is a — are materials related to the grievance procedure and one evaluation of Helen Bybee and we have no objection to that.

(Plaintiff's Exhibit No. 12 was received in evidence.)

MR. HARVEY: Plaintiff's Exhibit No. 14, staffing indexes of '88.

* * *

[359]

received.

(Plaintiff's Exhibit No. 137 was received in evidence.)

MR. HARVEY: Plaintiff's Exhibit No. 136.

THE COURT: Is that received without objection?

MR. DAVIS: It is, your Honor.

THE COURT: Plaintiff's Exhibit No. 136 will be received.

(Plaintiff's Exhibit No. 136 was received in evidence.)

MR. HARVEY: Plaintiff's Exhibit 164, which is part of the staff index sheets.

MR. DAVIS: That's actually a schedule for September 30, 1990 through January — I'm sorry, December 24th, 1990.

THE COURT: Any objection to that?

MR. DAVIS: None, subject again to arguing the weight and relevance, your Honor.

THE COURT: Sure, and that portion of 164 will be received.

(Plaintiff's Exhibit No. 164 was received in evidence.)

* * *

IN THE UNITED STATES DISTRICT COURT
CENTRAL DIVISION OF ILLINOIS
DANVILLE DIVISION

CASE NO. 91-2256

HELEN J. BYBEE,
Plaintiff,

vs.

PROCTOR COMMUNITY HOSPITAL,
Defendant.

Monday, September 14, 1992
12:15 o'clock p.m.

The deposition of JANICE McCOY, taken pursuant to notice on behalf of the Defendant, at the Boardroom, Cape Canaveral Hospital, Cape Canaveral, Florida, before Sandra Diane Evans, Stenograph Shorthand Reporter and Notary Public, State of Florida at Large.

APPEARANCES:

R. WAYNE HARVEY, ESQUIRE
Harvey & Stuckel, Chtd.
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Peoria, Illinois 61602
(309) 671-4900

Appearing on behalf of the Plaintiff

ROY G. DAVIS, ESQUIRE
Keck, Mahin & Cate
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Appearing on behalf of the Defendant

EXHIBIT
(Joint)
1

METRO REPORTING, INC.

* * *

[73]

department, but we tried to look at the whole nursing department as a whole.

And, again, we wanted to encourage people to be willing to transfer from unit to unit if necessary, or, again, going back to school and getting a different education. We didn't want to punish them if they moved from one unit to another.

Q. So, in other words, a transfer from one nursing area to another nursing area is not to be considered a hospital-wide transfer, but if a conflict occurs, we'll use hospital-wide seniority. Is that the way it should read?

A. Again, we never had any conflicts so it was never an issue.

Q. That's what you came up with, it that correct, that even though the manual reads that a transfer from one nursing area to another nursing area is not to be considered a hospital-wide transfer, you decided when this occurs, you're going to use hospital-wide seniority?

A. Yes. It would be nursing-wide seniority because we never compared these people to anyone else outside of nursing.

Q. So Helen had greater nursing seniority than Carol Roper, correct?

A. I don't recall who had — I think she had the [74] least seniority, which is the whole issue that we're discussing here.

Q. Carol only became a nurse — Carol Roper only became a nurse in 19 — Carol Roper became an LPN substantially after Helen Bybee was employed as an LPN, is that your knowledge?

A. I have no idea.

Q. Assume that Carol Roper was an LPN substantially after, at Proctor Hospital, Helen Bybee. The reason that she didn't move was because she had been employed in housekeeping and other jobs prior to becoming an LPN at Proctor Hospital for a longer period of time?

A. That's correct.

Q. But as far as being a nurse, she had substantially less time than Helen?

A. I don't recall.

Q. Mary Persack, who was working second shift full-time, she was there and had been an LPN longer than Helen, but had just moved to the floor in 1897 [sic]; do you recall that?

A. No.

Q. So even though your manual testifies or mentions that a transfer of one nursing unit to another

* * *

APPENDIX D

EXHIBIT
(Plaintiff's)
1

FROM EMPLOYEE HANDBOOK

VI. DISCIPLINARY AND TERMINATION PRACTICES

RESIGNATIONS — Employees shall submit written notice of resignation two weeks (four weeks for department heads, supervisors, and head nurses) in advance of the resignation date. The written resignation is to include a reason for leaving, a last day to be worked and a statement that the resignation is voluntary. Failure to give two weeks notice of resignation may disqualify the employee for future employment at the hospital and will result in the loss of pay of accrued vacation.

DISCIPLINE AND RULES — Violation of hospital rules of conduct constitutes cause for disciplinary action ranging from a verbal warning to immediate termination of employment, depending upon the nature of the offense, the employee's prior disciplinary record, the employee's length of service, and mitigation or aggravating circumstances, and any other pertinent facts. The termination of an employee for repeated minor violations must be preceded by recorded verbal and/or constructive advice form reprimands. The suspension or dismissal of an employee for repeated minor violations or because of unsatisfactory performance of job duties will be completed only after consultation with the Vice President of Personnel or a member of administration provided the employee has completed the 3 month probationary period of employment. However, there are certain violations of hospital policies that are so detrimental to the welfare of patients, employees, and/or the hospital that immediate suspension without notice is mandatory. Examples

of such violations included, insubordination, behavior contrary to accepted moral standards, unladylike or ungentlemanly conduct, dishonesty, reporting for work under the influence of intoxicating liquor or drugs, drinking on the job or the unauthorized use of drugs on hospital premises and actions displaying attitudes detrimental to patient care.

With incidents of this nature, the department head, Vice President of Personnel, and employee shall at the earliest convenience meet to determine whether the facts constitute immediate discharge. If it is determined that discharge is not warranted, the employee shall be returned to duty. If the employee disagrees with the handling of the reprimand or wants to appeal the decision he may do so through the appropriate grievance procedure outlined in this official handbook. The constructive advice record is the official written form for all employee reprimands. The department head should review all constructive advice forms with concerned employees and obtain his signature on the form. This signature does not state whether the employee agrees and disagrees but only says that he has read and received a copy of the reprimand. There is sufficient space on the form for the employee to indicate whether he concurs or does not concur with the reprimand. Again employees who disagree with the constructive advice or wish to appeal may do so through the grievance procedure.

Examples of violations of hospital rules include but are not limited to:

1. Inefficient or careless performance of duties.
2 Failure to respect confidential nature of hospital records and information about patients.
3. Altering, removing or destroying hospital records.
4. Refusal to follow instructions from a supervisor or other proper authority.

5. Deliberate or careless damage to materials or hospital property.
6. Falsifying personal or hospital records, including employment applications, or physical examination questionnaire.
7. Repeated tardiness or unexcused absence or abuse of sick leave.
8. Excessive number of wage attachments and garnishments.
9. Gambling, unauthorized soliciting, or selling on hospital premises.
10. Theft.
11. Drinking or apparently being under the influence of liquor or drugs while on duty.
12. Willful or repeated violation of hospital policies or procedures.
13. Theft of medication from hospital or patient supplies.
14. Narcotics violations.
15. Other actions which in the adjudgement of the department head or administrative office could result in serious adverse consequences to the hospital, department, another employee or the welfare of a patient.

These rules have been established for the guidance of all employees. They are not to restrict the rights of anyone, but to protect the interests of all. It is the sincere desire of the Hospital to help all employees in every way possible, but breaches of these rules will result in disciplinary action.

VII. GRIEVANCE PROCEDURE

GRIEVANCE PROCEDURE — IN GENERAL — Satisfactorily working relationships depend to a great degree on understanding among people. Good relationships are easier to achieve in an open atmosphere where problems and opinions are discussed freely, frankly and sincerely. The Hospital encourages all its personnel to conduct their daily affairs in this manner.

To assure prompt and fair consideration of problems that cannot be worked out, a formal procedure has been established. Each employee is afforded to right to express all complaints without fear of prejudice or reprisal against him. Acts of prejudice or reprisal against an employee who has filed a complaint shall not be tolerated from any supervisory or management personnel.

PROCEDURES — The grievance procedure may be used by any employee who has a complaint. The procedure is as follows:

Step 1: Any cause of dissatisfaction shall be presented by the employee orally or in writing to his Supervisor. The Supervisor shall give due consideration to the employee's problem and shall attempt to reach a settlement if such settlement is within the scope of his authority. The Supervisor shall make his decision and discuss it with the employee not later than the seventh calendar day after the complaint is made. If the employee fails to receive a reply in seven (7) days, if a satisfactory settlement cannot be reached, or if grounds for settlement are not within the scope of the Supervisor's authority, the complaint shall proceed to Step 2.

Step 2: The employee shall present the complaint in writing to his Department Head and the Personnel Department, and a conference shall be sched-

uled among the employee, the Department Head and the Vice President of Personnel. The Vice President of Personnel shall give due consideration to the problem and shall attempt to reach a settlement if such settlement is within the scope of his authority. The decision will be given to the employee within five (5) calendar days. Should the employee not receive a reply within five (5) calendar days, if a satisfactory settlement cannot be reached, or if grounds for settlement are not within the scope of the Vice President of Personnel's authority, the employee may proceed to Step 3.

Step 3: The employee shall submit his complaint to the Hospital President in writing. A thorough investigation will be conducted by the President or his designated assistant, who will discuss the matter, at his discretion, with the employee and Supervisor involved, either individually or together. The ruling on the matter will be delivered in writing to the employee and the Supervisor within ten (10) working days after the written complaint has been submitted. The decision of the President shall be in writing to all parties concerned. This decision shall be final and binding.

TIME LIMITS — A complaint may not be considered under this procedure if the time elapsed between its occurrence and the initial discussion with the Supervisor equals or exceeds thirty (30) days.

An employee wishing to appeal a decision rendered at any of the steps must do so within three (3) working days after notification of the deci-

sion. Should three (3) working days pass without notification by the employee of his intention to appeal, the matter shall be considered settled.

In cases that require extensive investigation, time limits specified in the steps may be extended as mutually agreed by the parties, who will attempt in good faith to reach a decision as promptly as possible.

All discussions pertaining to a complaint lodged by an employee shall be held after the completion of the employee's normal working hours, if at all possible.

RIGHT OF EMPLOYEE TO PROCEED DIRECTLY TO STEP 2 — If the subject of an employee's complaint concerns his Supervisor, the employee may, at his discretion, proceed directly to Step 2 of the procedure.

APPENDIX E

EXHIBIT
(Plaintiff's)
12

PROCTOR
COMMUNITY HOSPITAL

MIKE FRANKS
Vice President, Personnel

DATE 11-28-88 TIME _____

MEMO TO: RE: HELEN BYBEE - GRIEVANCE

DISCUSSED WRITTEN COMPLAINT. NO SUBSTANANT [sic] COMPLAINT IN WRITTEN GRIEVANCE. APPEARED TO BE MORE OF A REQUEST TO REVIEW DECISION TO MOVE HER TO NIGHT SHIFT DUE TO PERSONAL NEEDS.

HELEN STATED SHE WOULD NOT WORK NIGHTS. NEEDS TO BE WITH HER SON AND CAN'T SLEEP AFTER WORKING NIGHTS.

I INFORMED HERE THAT THE NURSING SERVICE HAD BEEN REVIEWING ALL POSSIBLE ALTERNATIVES, BUT WITH DIFFICULTY. ANY OTHER POSITION WOULD REQUIRE SOME ALTERNATE SHIFT REQUIREMENTS.

CURRENTLY UNDER CONSIDERATION: 1) PLACE HE ON SHORT-TERM LEAVE TO WAIT FOR OPENING; 2) CONSIDER AS REPLACEMENT FOR AN UPCOMING L.O.A. REPLACEMENT; 3) FIND ANOTHER POSITION FOR CAROL ROPER AND RETURN HELEN TO 4 CENTER.

11-14-88

Mike Franks:

Grievance Procedure Step 2

This is concerning a severe hardship that will be place on my family and myself because of a recent decision made by Susan Gulley PCC of 4 Center, to schedule me to work the 11-7 shift. I worked the third shift for six and a half years before I finally got on days and I unable to get much rest or sleep at that time.

I have a severely handicapped son, and Susan is fully aware of this, who is totally dependent on my husband and myself to supply him with the care and love and therapy he needs. He is unable to do very little for himself and requires twenty-four hours of total care. My husband is hard of hearing and can not even hear John at night when he needs something.

In order for me to work the third shift, the only other alternative would be to place John in a nursing home, and this is something I am unwilling to do. He needs his family and home if he is ever going to fully recover from his injuries. He has come from a vegetable stage to sitting up in a wheelchair and standing with the help of two people. He is attempting to talk and can feed himself part of the time and is fully aware and alert. He has progressed so much, even the doctors were amazed when they saw him after he had been home eight months. I can not and will not let him regress by not being here to give him the love and care he needs.

Since by husband works second shift, the only other help we will have after next week, will be my other son who was also injured in an unrelated accident, and is still on crutches. He will be able to be here at the time my husband leaves and I get home., then he has to be home with his own family. His wife works the third shift so he has to be home to care for his small children.

I have been a valued employee of Proctor Hospital for almost sixteen years and I have always been a loyal and devoted employee, giving well over 100%. I think you will find I have always had excellent evaluations and have always given the patients my best as well as my co-workers and the Doctors that I have assisted with the many procedures done on our unit and also made rounds with many of them. I have also promoted Proctor as the best in Peoria and recommended Proctor to many people.

I hope you will give this your careful attention, as I still want to give the patients the care they deserve and need on a shift I am able to work and on the unit I have worked for many years.

Thank you,
Helen Bybee, L.P.N. 4 Center
/s/ Helen Bybee

PROCTOR COMMUNITY HOSPITAL

TERMINAL EVALUATION

NAME: Helen Bybee EMP.# 3381

EMPLOYED: FROM February 5, 1973 TO December 1, 1988

DEPARTMENT: Nursing POSITION: LPN-4C

REASON FOR TERMINATION: Retirement

	Outstanding	Satisfactory	Unsatisfactory
Emotional Stabililty		✓	
Initiative	✓		
Ability to Learn		✓	
Attitude		✓	
Co-operation		✓	
Quality of Work		✓	
Dependability		✓	
Tact		✓	
Sense of Responsibility		✓	
Productivity		✓	
Appearance and Cleanliness		✓	

	Few	Considerable	Excessive
A. Absenteeism	Has had physical problems - has had		
B. Tardiness	time off to care for son.		

ELIGIBLE FOR REHIRE YES NO

REMARKS Helen can not work any shift other than 7-3 so would question feasibility to rehire under those conditions.

SIGNED /s/ Susan Gulley, RN

POSITION Patient Care Coordinator

ANECDOTAL NOTES

EMPLOYEE Helen Bybee, LPN

DATE	OBSERVATIONS OF EMPLOYEE PERFORMANCE
	7/25/79 Doing superior work - goes out of her way to be helpful. Work is accurate and complete. Dependable, intelligent & interested worker. Proceeds well on her own **SIGNATURE:**

* * *

Norman LaConte:

This is a copy of the letter I sent to Mike Franks on Nov. fourteenth. He finally got back to me on Nov. 28, with no solution at that time.

I know I am not anyone special to Proctor Hospital, but i kind of felt I was. I have always loved my work and enjoyed being here to care for the patients, although it has gotten very hard to give the patients the care and time they deserve lately. There has been so many things happening here and not everything is for the best. I really feel lately, we have lost the one thing that has made Proctor the best in Peoria, that is good patient care. We seem to be spending more time with paper work than caring and talking with patients. Sure you can get the work done with 4.5 people but you don't have the time to give that little extra special care that Proctor was known for.

Now that the patients are on the whole, elderly they need us to give them the old T.L.C., instead we hurry around trying to fill out all the forms someone thought up that doesn't work on the units, and try to clock out before the overtime starts.

I hear the word continuity of patient care continuously but what does it mean if you don't have time to give that good care. I only see shifting of workers here and there and from shift to shift.

Here is an example of what I mean, Carol Roper, L.P.N. had worked on the Oncology unit since it opened on three west. She is on six or seven committees on the care of this type of patients. All at once they had too many L.P.N.'s on this unit, although they are really short of help, so according to seniority she was transferred to four center, and kept L.P.N.'s that were there only since four southwest was divided into two units. If we needed only one L.P.N. on four center, why was she transferred in the first place. Now they say we only need one of us on the 7-3 shift, so they say I must go to the 11-7 shift, which I cannot work.

Then there is the moving of all the L.P.N.'s out of recovery room and out patient surgery. These people were good enough to do the job for a long time, then all at once they weren't good enough. Someone had better see the light, that you need these nurses. They are good nurses and have done a good job. To move them because someone suddenly things [sic] they aren't, is a shame. Just having R.N. behind your name doesn't make you the best for the job.

They talk about in house seniority and this is something else I don't understand. Now if you have a nurse that has worked as a staff nurse for ten years on one unit and a new graduate that worked in let's say, housekeeping has ten years and one month then got her degree would you keep the new or the old, unless of course you wanted to get rid of the one with just ten years. I think someone had better start thinking as to what is best for Proctor Hospital, employee's moral and patient care. At this time it is hard to find an employee that is happy and not complaining of having to work all three shifts or not enough help and can't get the work done or in order to get it done had to skip lunch. Some are being required to work twelve hour shifts and no one can be as alert when working twelve hours, no more than I could caring for my son eight hours then going to work eight hours then trying to sleep days, when I can't sleep with it's light out.

I know there is a problem with staffing right now but Proctor is loosing its caring policy and I have been hearing this quite often this past year or so. Nurses are leaving that have been here a long time and to me it is very important to treat the old employees as good as the new ones. If new nurses see that people are treated badly that have been here a long time, what chance do they have in one or two years.

Another thing we are loosing ground on is the doctors. If it weren't for doctors bring [sic] patients here, we wouldn't have a hospital. So you had better keep them happy. If a doctor wants

his patients on four center, why put them on four south or three southwest, because someone said he can just yell if he wants to, we'll put them where we want. I have heard doctors complain many times about this. We don't ask if it is okay to put them on the oncology unit because they are being admitted with possible cancer, we do it, maybe they don't want them on that unit until after surgery. There is one doctor asked if I would just walk over to four center with him, even though he knows I don't work on that unit. One nurse said yes she cared but he said walk with me anyway, which I did. What is wrong with keeping him happy so he will bring more patients to Proctor. This same nurse asked me to help her put a patient back to bed which I did but it didn't make any difference then that I wasn't working that unit when they needed an extra pair of hands. If a doctor wants his patient on four south or four center why put them somewhere else if it makes him happy and he brings more patients here. Isn't that what it's all about, admitting patients here.

One more thing, I am being forced to take early retirement and it will be Proctor's loss, as I do know how to care for the pre- and post-operative patients as well as some and better than most. I know what has to be done and what to do to insure good post operative recovery. You may ask most any surgeon, if I was good at my job, such as Doctors Montgomery, Adams, Archer, Song and Sutherland and many more and I'm sure you'll hear nothing but good things.

On second thought, I don't think I want to work any more for a place that has changed so much that they no longer care about the employees or patients and if you don't make some changes, there won't be a Proctor Hospital. You won't need nurses because the doctors won't be admitting patients.

I'm really sorry to be leaving after sixteen years of working at a place and job I really loved, until now. Mike Franks made a statement that maybe a ward clerk's position would be available

but I'm not a damn ward clerk, I'm a nurse and a damn good one. So I'll have to take early retirement and loose out on the amount I would have gotten if I would have been allowed to work a few more years. As I said I maybe one of the lucky ones to be out now.

I feel these things needed to be said so I hope you will give some thought to what I have said and I hope there won't be any more people treated in this way and many have been in the past. I could go on and say a few more things but I'll let it go as maybe I'm the lucky one to be out of the mess that Proctor is in now.

Helen Bybee, L.P.N.

Mike Franks:

Grievance Procedure Step 2

This is concerning a severe hardship that will be place on my family and myself because of a recent decision made by Susan Gulley PCC of 4 Center, to schedule me to work the 11-7 shift. I worked the third shift for six and a half years before I finally got on days and I unable to get much rest or sleep at that time.

I have a severely handicapped son, and Susan is fully aware of this, who is totally dependent on my husband and myself to supply him with the care and love and therapy he needs. He is unable to do very little for himself and requires twenty-four hours of total care. My husband is hard of hearing and can not even hear John at night when he needs something.

In order for me to work the third shift, the only other alternative would be to place John in a nursing home, and this is something I am unwilling to do. He needs his family and home if he is ever going to fully recover from his injuries. He has come from a vegetable stage to sitting up in a wheelchair and standing with the help of two people. He is attempting to talk and can feed himself part of the time and is fully aware and alert. He has progressed so much, even the doctors were amazed when they saw him after he had been home eight months. I can not and will not let him regress by not being here to give him the love and care he needs.

Since by husband works second shift, the only other help we will have after next week, will be my other son who was also injured in an unrelated accident, and is still on crutches. He will be able to be here at the time my husband leaves and I get home., then he has to be home with his own family. His wife works the third shift so he has to be home to care for his small children.

I have been a valued employee of Proctor Hospital for almost sixteen years and I have always been a loyal and devoted employee, giving well over 100%. I think you will find I have

always had excellent evaluations and have always given the patients my best as well as my co-workers and the Doctors that I have assisted with the many procedures done on our unit and also made rounds with many of them. I have also promoted Proctor as the best in Peoria and recommended Proctor to many people.

I hope you will give this your careful attention, as I still want to give the patients the care they deserve and need on a shift I am able to work and on the unit I have worked for many years.

Thank you,
Helen Bybee, L.P.N. 4 Center

APPENDIX F

EXHIBIT
(Plaintiff's) 136

PROCTOR COMMUNITY HOSPITAL

509 N. Knoxville Avenue
Peoria, IL 61614
Phone 309-691-1000

To balance the staffing mix on 4C.

To staff 11-7 shift with 3 care givers - ADC 16 - due to ↑ ocuity; ↑ late surgicals; ↑ AM admissions.

		Present Staff	Interim → 11/27/88	Proposed 11/27/88 →
7-3	RN	3.8	4.8	4.8
	LPN	2.0	2.0	1.0
	NA	1.0	1.0	1.0
3-11	RN	2.1	4.1	4.1
	LPN	1.6	1.6	1.5 (LPN .6 → .2 ?)
	NA	1.4	1.4	1.4
11-7	RN	3.5	3.1	3.1
	LPN			1.0
	NA	1.0	1.0	1.0

The proposed staffing pattern would allow

4-5 Caregivers on 7-3 with shared aide.

3-4 Caregivers on 3-11 with shared aide.

3 Caregivers on 11-7 with shared side.

One 3-11 RN will be asked to work 7-3 on weekends to balance that staffing.

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

FILE NO. 1989 SA 0554

AFFIDAVIT OF SERVICE

Byron Elam, being first duly sworn, on oath states that he served a copy of the attached NOTICE OF SUBSTANTIAL EVIDENCE on each person named below by depositing same this 14th day of AUGUST, 1990, in the U.S. Mail Box at 100 West Randolph Street, Chicago, Illinois, properly posted for (FIRST CLASS) (CERTIFIED) mail, addressed as follows:

CERTIFIED MAIL

Helen J. Bybee
R.R. #3, Box V81
Chillicothe, Illinois 61523

Roy G. Davis
Attorney At Law
640 Peoria Savings Plaza
Peoria, Illinois 61602

/s/ Byron Elam
Byron Elam

SUBSCRIBED and SWORN to before me
This 14th day of AUGUST, 1990
/s/ Marlene E. Mitchell
NOTARY PUBLIC

"OFFICIAL SEAL"
MARLENE E. MITCHELL
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 1/11/94.

STATE OF ILLINOIS
Department of Human Rights
100 West Randolph Street, Illinois Center, Suite 10-100
Chicago, Illinois 60601
312-814-6200

James R. Thompson
Governor

Joyce E. Tucker
Director

AUGUST 14, 1990

Helen J. Bybee
R.R. #3, Box V81
Chillicothe, Illinois 61523

Roy G. Davis
Attorney At Law
640 Peoria Savings Plaza
Peoria, Illinois 61602

RE: BYBEE vs. PROCTOR COMMUNITY HOSPITAL
Charge No.: 1989 SA 0554

NOTICE OF SUBSTANTIAL EVIDENCE

The Director of the Department of Human Rights has reviewed the investigation report in the above-captioned matter and has determined that there is substantial evidence that a civil rights violation has been committed as alleged.

The Illinois Human Rights Act mandates that the Department endeavor "to eliminate the effect of the alleged civil rights violation and to prevent its repetition by means of conciliation," Section 7-102(D)(2)(b).

After a finding of substantial evidence has been made, a Department staff attorney will ascertain what constitutes full relief and what measures are necessary to prevent repetition of the discrimination in each case. The staff attorney may confer with the parties in order to make this determination. Full relief may include, but is not limited to: back pay, out of pocket expenses, attorneys fees, fringe benefits and other expenses incurred as a result of the complained of discrimination. An

example of "other expenses" is medical costs incurred because of no medical insurance coverage which otherwise would have existed while employed at Respondent. You should also be aware that pain and suffering awards may be appropriate in cases where the Respondent's conduct was particularly serious and where you can provide medical or psychiatric documentation to substantiate the harm. Measures to prevent repetition of discrimination may include, but are not limited to: posting requirements, reporting requirements, and revising policies and procedures.

Enclosed is a copy of the pertinent relief section of the Illinois Human Rights Act (A-J) so you may have some guidelines in formulating your demand.

Please have the following documents and/or information available when you contact the Department:

1. Copies of Income tax returns (W-2 forms) from the year of your last employment with Respondent and up to the present year;

2. Hourly pay rate and/or pay check stubs from the Respondent;

3. A list of all jobs you have held since leaving Respondent's employment if applicable and hourly pay rate at each job (itemized);

4. A list of all out of pocket expenses incurred as a result of the alleged discriminatory acts, and;

5. A list of all questions you may have regarding settlement of this charge.

Attorney Lisa M. Aisner has been designated by the Director to conduct conciliation efforts in this case. Please contact her once you have collected all the above information to begin

discussion of settlement possibilities and/or if you have any questions. She may be reached at (312) 814-6262.

Sept. 3rd.

Department of Human Rights

STATE OF ILLINOIS
DEPARTMENT OF HUMAN RIGHTS
INVESTIGATION REPORT

DHR. NO. 1989SA0554 EEOC NO. 21B892334

COMPLAINANT	*RESPONDENT*
Helen J. Bybee	Proctor Community Hospital

I. *Issue/Basis*

A. Unequal Terms and Conditions/Age

B. Constructive Discharge/ Age

II. *Recommendation*

A. Substantial Evidence

B. Substantial Evidence

III. Tom Garber/akr #815-5108 /s/ C. Franklin Meredith

IV. *Jurisdiction*

Alleged Violation	December 1, 1988
Charge Filed	May 15, 1989
D/F/A	March 12, 1990
Number of Employees	1009

V. *Uncontested Pertinent Facts*

A. Complainant was hired on February 5, 1973.

B. Complainant was told to either work the third shift or take early retirement.

C. On December 1, 1988, Complainant resigned.

VI. *Issue One - Unequal Terms and Conditions*

A. *Complainant's Position*

Complainant alleges that she was subjected to unequal terms and conditions as a result of her age (59), in that she was told to either work the third shift or take early retirement.

B. *Respondent's Position*

Respondent contends that Complainant was given this ultimatum as a result of staffing requirements.

C. *Summary of Pertinent Witness Statements*

Complainant states that in October of 1988 Susan Gulley (mid 30's), Nursing Supervisor, came to her and informed her that she would have to transfer from the 7:00 A.M. - 3:00 P.M. shift to the 11:00 P.M. - 7:00 A.M. shift. Gulley informed Complainant that because she had less seniority than Carol Roper (mid 30's), Licensed Practical Nurse, Roper would be allowed to remain on the 7:00 A.M. - 3:00 P.M. shift and Complainant would have to transfer to the 11:00 P.M. - 7:00 A.M. shift.

Complainant asked that if indeed this was a seniority question and she was, in essence, being bumped from her day shift job, why was Cathy McCarty (33), Licensed Practical Nurse, who had less seniority than Complainant, allowed to remain in her day shift position on an adjacent wing? Complainant was informed by Michael A. Franks (43), Vice President of Personnel, that Proctor Hospital has no bumping rights concerning seniority. Complainant reiterated to Franks her concern for remaining on the day shift as a result of her personal obligations. Franks then informed Complainant that there might be a secretarial position available on the day shift, but if this position in

question were open, a secretary from second or third shift would have first bid, because Complainant had no seniority as a secretary. Complainant told Franks that she was not interested in a secretarial job because she was a nurse.

Michael A. Franks (43), Vice President of Personnel, stated that as a result of staffing requirements, it was essential that one of the Licensed Practical Nurses on "4 center" wing, where Complainant worked, would have to have their shift changed to 11:00 P.M. - 7:00 A.M. Franks said that after Gulley consulted with him on which of the LPN's would be transferred, he decided that the employee with the least amount of in-house seniority would be transferred.

Franks said that both Complainant and Roper were informed of the circumstances and if there was no volunteer, then a mandatory transfer would be made on the basis of seniority. Franks said that seniority is used only as a tie breaker. Complainant was informed that she would be given a month to make any necessary arrangements and the transfer would be effective after November 17, 1988.

Complainant told Gulley that she would not work the 11:00 P.M. - 7:00 A.M. or the 3:00 P.M. - 11:00 P.M. shifts. Franks said Gulley told Complainant that she would be scheduled to work the 11:00 P.M. - 7:00 A.M. shift starting on November 27, 1988, and should she choose not to work, that was her decision. Franks stated that he and Gulley had another conversation on alternate solutions to the problem, but due to staffing requirements, were unable to find another position that wouldn't involve at least some 11:00 P.M.- 7:00 A.M. shifts. On December 1, 1988, Complainant

voluntarily retired and began drawing her monthly pension. Franks states that Complainant's decision to retire was wholly hers and that Respondent had a job for Complainant, which for personal reasons, she refused to work.

Shirley Suits (51), former Nursing Supervision at Proctor Hospital, said that Complainant worked under her supervision for 8 to 10 years. Suits states that Complainant was an excellent, devoted employee. Suits said that both Complainant (LPN) and Gulley (RN) worked under her supervision at Proctor. Suits also said doctors would ask for Complainant by name when they were making rounds. The only reason a doctor would ever ask for Gulley was because Complainant, as an LPN, could not legally perform some procedures. Suits felt this made Gulley jealous on many occasions.

Suits said that she worked for Proctor for 22 years, over 10 of which she was Nursing Supervisor, and in 1988, she too was told to either work the 11:00 P.M. - 7:00 A.M. shift or retire. Suits quit Proctor and went to work at another hospital. Suits states she attempted to bring charges against Proctor, but when she contacted the Department of Human Rights, the jurisdictional time requirement had expired.

D. *Summary of Exhibits*

1. Complainant's last performance appraisal, dated February 15, 1988, was written by former Nursing Supervisor, Shirley Suits, indicates that Complainant's performance was rated as high as the performance appraisal allows.

2. Respondent's list of employees discharged from employment between October 1988 and August of

1989 shows that of 39 persons discharged, eleven or 28% were in the protected age group.

E. *Conclusion*

Complainant alleges that she was subjected to unequal terms and conditions as a result of her age in that Respondent subjected Complainant to arbitrary rules concerning seniority. Complainant was told that as a result of her in-house seniority, she would have her shift changed. Complainant actually had approximately three years more experience than Carol Roper, because Roper hired in as a Central Supply Clerk, and while working at Proctor, became an LPN> So while Roper had more in-house seniority, Complainant had been an LPN three years longer than Roper. Another employee, Cathy McCarty (33), Licensed Practical Nurse, who had less seniority than both Complainant and Roper, remained on the 7:00 A.M. - 3:00 P.M. shift. If, in fact, Respondent was utilizing a seniority policy in a non-discriminatory fashion, the employee with the least amount of in-house seniority would have been subject to the shift change. Therefore, staff recommends a finding of substantial evidence.

VII. *Issue Two - Constructive Discharge*

A. *Complainant's Position*

Complainant states that she was constructively discharged as a result of her age (59), in that Respondent told Complainant to either work the 11:00 P.M. - 7:00 A.M. shift or take early retirement.

B. *Respondent's Position*

Respondent states that Complainant was give this ultimatum as a result of staffing requirements. Re-

spondent had a job for Complainant, but as a result of personal problems, she was unable to work the job.

C. *Summary of Pertinent Witness Statements*

Complainant states that in October of 1988, she was told by Susan Gulley (mid 30's) that as a result of her seniority, she would have to transfer to the 11:00 P.M. - 7:00 A.M. shift. Complainant said that Gulley told her that only one of the two Licensed Practical Nurses would remain on the 7:00 A.M. - 3:00 P.M. shift. Even though Complainant had been an LPN longer than the other LPN on the 7:00 A.M. - 3:00 P.M. shift, Carol Roper (mid 30's), Roper had more in-house seniority than Complainant and therefore, Roper would be allowed to remain on the 7:00 A.M. - 3:00 P.M. shift.

Complainant asked Michael A Franks (43), that if this were a question of seniority, why was Cathy McCarty (33), LPN, allowed to stay in her 7:00 A.M. - 3:00 P.M. position on an adjacent hospital wing. Complainant states that she was told by Franks that Proctor Hospital had no bumping rights concerning seniority.

Michael A. Franks (43), Vice President of Personnel, states that as a result of staffing requirements, one of the two LPN's on the 7:00 A.M. - 3:00 P.M. shift would have to have their shift changed to the 11:00 P.M. - 7:00 A.M. shift. Franks said he deliberated with Gulley over which of the LPN's would be transferred. Franks said the decision was made to transfer the employee with the least amount of in-house seniority.

Franks states that although Proctor Hospital does not usually employ seniority or employee bumping rights, this case was special and seniority was used as a tie breaker.

Franks said that Respondent had a job for Complainant, but she refused to work it because doing so would require a shift change.

Franks said the other LPN on the 7:00 A.M. - 3:00 P.M. shift, Cathy McCarty (mid 30's), was on a different wing and therefore, not subject to the seniority question.

D. *Conclusion*

Respondent told Complainant that as a result of her seniority, she would have to transfer from the 7:00 A.M. - 3:00 P.M. shift to the 11:00 P.M. - 7:00 A.M. shift. Two LPN's on the 7:00 A.M. - 3:00 P.M. shift, who had less seniority than Complainant, were not give this ultimatum. If Respondent was utilizing a seniority policy in a non-discriminatory fashion, the employee with the least amount of seniority should have been subjected to the shift change. Therefore, staff recommends a finding of substantial evidence.

List of Witnesses

(This list is a part of the Investigation Report and will be sent to both parties)

Charge No. 1989SA0554

Complainant Helen J. Bybee

Respondent Proctor Community Hospital

Following is a list of witnesses interviewed by Staff at the Fact Finding Conference (FFC) or by other means (or that Staff attempted to interview) during investigation of the above referenced charge.

1. Helen J. Bybee (59) Fact Finding Conference
2. Ray G. Dains (42) Fact Finding Conference
3. Michael A. Franks (43) Fact Finding Conference
4. Jeffery Bybee ( ) Fact Finding Conference
5. Shirly [sic] Suits (51) Telephone

* * *

ALS NO(S): 4670
CHARGE NO(S): 1989SA0554
EEOC NO(S): 21B892334
CASE NAME(S): Bybee v. Proctor Comm. Hospital

AFFIDAVIT OF SERVICE

SHALONDA RODRIGUEZ, being first duly sworn, on oath states that on SEPTEMBER 17, 1990 SHE served a copy of the attached NOTICE OF FILING, NOTICE OF PUBLIC HEARING, COMPLAINT, PRE-HEARING MEMORANDUM, AND ATTORNEY LETTER on each person named below by depositing same in the U.S. mail box at 100 W. Randolph Street, Room 5-100, Chicago, Illinois, properly posted for Certified mail, addressed as follows:

CERTIFIED AND FIRST CLASS MAIL TO:

HELEN J. BYBEE
R.R. #3 BOX V 81
CHILLICOTHE, IL 61523

CERTIFIED MAIL TO:

ROY G. DAVIS
ATTORNEY AT LAW
640 PEORIA SAVINGS PLAZA
PEORIA, IL 61602

Subscribed and sworn to before me on this, 27th day of September, 1990.

/s/ illegible
NOTARY PUBLIC

/s/ Shalonda Rodriguez

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

CHARGE NO. 1989 SA 0554
EEOC NO. 21B892334

IN THE MATTER OF:

HELEN J. BYBEE,
COMPLAINANT,

AND

PROCTOR COMMUNITY HOSPITAL,
RESPONDENT.

NOTICE OF FILING

TO: Helen J. Bybee
R.R. #3 Box V 81
Chillicothe, Illinois 61523

Roy G. Davis
Attorney At Law
640 Peoria Savings Plaza
Peoria, Illinois 61602

PLEASE TAKE NOTICE that on September 20, 1990, a Complaint was filed in this matter with the Illinois Human Rights Commission pursuant to Section 7-102(F) of the Human Rights Act.

DEPARTMENT OF HUMAN RIGHTS
JOYCE E. TUCKER, DIRECTOR

BY: /s/ Lisa M. Aisner
Lisa M. Aisner
Staff Attorney

PROOF OF SERVICE

Byron Elam, a non-attorney, being first duly sworn on oath, deposes and states that he served the foregoing Notice of Filing upon the persons to whom it is directed, by placing copies of the same in envelopes, first class mail, proper postage prepaid, in the U.S. mail located at 100 West Randolph Street, Chicago, Illinois 60601, on September 20, 1990.

/s/ Byron Elam
Byron Elam

SUBSCRIBED and SWORN to before me
This 20th, day of September 1990.

/s/ Marlene E. Mitchell
NOTARY PUBLIC

OFFICIAL SEAL
MARLENE E. MITCHELL
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 1/11/94

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

CHARGE NO(S): 1989SA0554
EEOC NO(S): 21B892334
ALS NO(S): 4670

IN THE MATTER OF:

HELEN J. BYBEE,
Complainant(s),

AND

PROCTOR COMMUNITY HOSPITAL,
Respondent(s).

NOTICE OF PUBLIC HEARING

PLEASE TAKE NOTICE that on NOVEMBER 17, 1990 at 9:30 a.m., a public hearing will commence in the above-captioned matter before HELEN WEIDENHEIM, a duly appointed Administrative Law Judge of the Illinois Human Rights Commission, at Bloomington Human Relations Program & Bloomington City Hall, 109 E. Olive, Bloomington, Illinois 61701.

The public hearing will be held to receive pertinent evidence on the attached complaint alleging civil rights violation(s) in violation of Section 1-101 *et seq*. of the Human Rights Act, Ill.Rev.Stat. ch. 68, Section 1-101 *et seq*. The public hearing will be conducted pursuant to Section 8-106 of that Act, Ill.Rev.Stat. ch. 68, Section 8-106, and the Rules and Regulations of the Illinois Human Rights Commission, 56 Ill. Administrative Code Ch. XI Section 5300 *et seq*.

All parties are entitled to be represented by legal counsel, to present evidence, to respond to evidence presented by opposing parties and to make argument. The parties are also advised that

disposition may be made by voluntary dismissal, agreed settlement, consent order or default.

The respondent is hereby notified that it shall file an answer within 30 days of the date of service of the complaint. The answer shall be filed in accordance with the Commission's Rules and Regulations.

HUMAN RIGHTS COMMISSION

BY: /s/ Patricia A. Patton
PATRICIA A. PATTON
CHIEF ADMINISTRATIVE
LAW JUDGE
ADMINISTRATIVE LAW SECTION

ISSUED ON THIS 27TH DAY OF SEPTEMBER 1990.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

CHARGE NO. 1989 SA 0554
EEOC NO. 21B892334

IN THE MATTER OF:

HELEN J. BYBEE,
COMPLAINANT,

AND

PROCTOR COMMUNITY HOSPITAL,
RESPONDENT.

COMPLAINT OF CIVIL RIGHTS VIOLATION

In accordance with provisions of the Illinois Human Rights Act, ("Act") Ill. Rev. Stat., ch. 68, Section 1-101 *et seq.*, and pursuant to the authority vest in it by the Act, the ILLINOIS DEPARTMENT OF HUMAN RIGHTS ("Department") hereby issues and files its complaint in this cause as follows:

PARAGRAPH ONE: That Complainant Helen J. Bybee, filed Charge No. 1989 SA 9554 with the Department on May 15, 1989 alleging on her own behalf to have been aggrieved by practices of age discrimination prohibited by Section 2-102(A) of the Illinois Human Rights Act;

PARAGRAPH TWO: That at the time of the incidents complained of herein, Respondent, Proctor Community Hospital, was an "Employer" as defined in Section 2-101(B)(1)(a) and (c) and was subject to the provisions of the Act;

PARAGRAPH THREE: That complainant's age is 59;

PARAGRAPH FOUR: That Complainant was hired by Respondent in February 1973. Complainant was working as a Licensed Practical Nurse (L.P.N.) during the incidents complained of herein;

PARAGRAPH FIVE: That Complainant always performed her assigned job duties in an acceptable manner consistent with Respondent's standards;

PARAGRAPH SIX: That on December 1, 1988 Respondent subject Complainant to unequal terms and conditions of employment, to wit: she was told to transfer to the third shift or retire; Respondent constructively discharged Complainant on said date;

PARAGRAPH SEVEN: THAT Respondent's stated reason for said actions is its staffing requirements;

PARAGRAPH EIGHT: That Respondent stated reason is pretextual;

PARAGRAPH NINE: That Respondent failed to force Carol Roper, age mid 30's or Cathy McCarty, age 33, similarly situated L.P.N.'s with less seniority, to chose between transferring to the third shift or retiring;

PARAGRAPH TEN: That Respondent subjected Complainant to unequal terms and conditions of employment and constructively discharged Complainant because of her age, 59, in violation of Section 2-102(A) of the Illinois Human Rights;

WHEREFORE and Order is requested providing the following relief:

(a) That Respondent reinstate Complainant to a position comparable to what she would have had at a rate of pay comparable to what she would be receiving if not for the civil rights violation committed against her by Respondent;

(b) That Respondent reinstate Complainant's coverage under all insurance policies heretofore cancelled by Respondent; that Respondent pay all such premiums and medical expenses incurred as a result of the cancellation of said insurance coverage;

(c) That Respondent pay to Complainant a sum equal to any damages she may have suffered as a result of the civil rights violations committed against her by Respondent, including but not limited to, loss of wages; bonuses, insurance premiums, medical bills or pension benefits.

(d) That Complainant be made whole as to all benefits and seniority status that would have accrued to her but for the civil rights violations committed against her by Respondent;

(e) That Respondent clear from Complainant's personnel records all reference to the filing of this charge, and the subsequent disposition thereof; and provide Complainant with a neutral letter of reference;

(f) That Respondent cease and desist from discriminating on the basis of age in its employment practices;

(g) That Respondent pay to Complainant reasonable attorney's fees and costs incurred as a result of the civil rights violation alleged herein; and

(h) That any and all public contracts with the State of Illinois, held by Respondent shall be terminated immediately;

(i) That Respondent be barred from holding any public contract for a period up to, but not to exceed, three years;

(j) That a penalty up to, but not to exceed, the profit earned by Respondent as a direct result of this civil rights violation shall be paid to the State Treasurer;

(k) That such further relief be granted as may be necessary to make Complainant whole.

ISSUED and FILED this 20th, day of September, 1990.

DEPARTMENT OF HUMAN RIGHTS
BY: /s/ Joyce E. Tucker
JOYCE E. TUCKER, DIRECTOR

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

LISA M AISNER, being duly sworn on oath, states that she is STAFF ATTORNEY, for the DEPARTMENT OF HUMAN RIGHTS; that she is familiar with facts relating to the above-captioned charge; that she has read the foregoing Complaint; and based on information and belief the facts alleged therein are true and correct.

/s/ Lisa M. Aisner
Lisa M. Aisner
Staff Attorney

SUBSCRIBED and SWORN to before me
This 20th day of September 1990.

/s/ Marlene E. Mitchell
NOTARY PUBLIC

OFFICIAL SEAL
MARLENE E. MITCHELL
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 1/11/94

INFORMATION FOR LITIGANTS BEFORE THE HUMAN RIGHTS COMMISSION

1. Unrepresented complainants are urged to obtain counsel as quickly as possible. Incorporated respondents are required by law to be represented by an attorney.

2. The four-digit ALS number which appears on the complaint must be clearly marked on the first page of every document filed with the Human Rights Commission.

3. Discovery requests and responses are not filed with the Commission; the certificate of service for such materials should, however, be filed and should clearly identify the case name and the ALS number.

4. Public hearing before the Administrative Law Judge are on the record. A court reporter is present, at the Commission's expense, and the Commission orders the original transcript. Copies are available from the court reporter at the party's expense. Illinois 'Rules of Evidence govern and are enforced by the presiding Administrative Law Judge.

5. Aside from the original charge of discrimination, none of the materials in the Department of Human Rights file are part of the public hearing record. Such materials will be considered by the Administrative Law Judge only if there is appropriate foundation and they are otherwise admissible. Department employees may be called as witnesses in the public hearing only with leave of the Administrative Law Judge, as provided in Section 750(b)(3) of the Rules and Regulations of the Human Rights Commission, 56 Ill. Admin. Code ch. XI, §5300.750(b)(3) (1985).

6. The Administrative Law Judge is bound by Commission decisions, which are published and available from Tower Records of Illinois. Federal decisions interpreting analo-

gous Federal law are also helpful and relevant, though not binding, precedent.

7. The issues of liability and damages will ordinarily be bifurcated for hearing, with the damages evidence to be presented immediately following the close of all evidence on liability.

8. Following receipt of the transcript, the Administrative Law Judge will enter a schedule requiring the submission of post-hearing briefs. Such briefs should include proposed findings of fact in numbered paragraphs, proposed conclusions of law in numbered paragraphs, and a discussion of the evidence and authorities.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

CHARGE NO(S): 1989SA0554
EEOC NO(S): 21B892334
ALS NO: 4670

IN THE MATTER OF:

HELEN J. BYBEE,
Complainant(s),

AND

PROCTOR COMMUNITY HOSPITAL,

STANDING ORDER RELATING TO PRE-HEARING PROCEDURES AND PRE-HEARING MEMORANDUM FORM

I. *MOTION PRACTICE*. All pre-hearing motions will be considered and decided, pursuant to the terms of Section 730 of the Human Rights Commission's Rules and Regulations, 56 Ill. Admin. Code ch. XI §5300.730 (1985), by the Administrative Law Judge identified in the Notice of Public Hearing. That Administrative Law Judge or another Administrative Law Judge will be assigned to conduct the hearing. All motions, objections, pleadings, and correspondence filed with the Administrative Law Division shall bear the ALS number, identified in the caption above, clearly marked on the first page of each document filed.

II. *DISCOVERY*. In order for the parties to comply fully with the requirements for the filing of a pre-hearing memorandum set forth below, the parties are directed to cooperate in completing discovery as soon as possible. Section 720 and 725 of the Commission's Rules, 56 Ill. Admin. Code ch. XI, §5300.720 and 725, provide the scope of discovery and the procedure to follow for obtaining and objecting to discovery. Pursuant to Section

725, requests for discovery and responses thereto shall be served upon other parties, but not filed with the Commission. *Only the proof of service, with the case name and ALS number clearly identified, shall be filed with the Commission.* Copies of relevant portions of discovery requests or responses shall be attached to any written motion with respect to discovery. Unless otherwise indicated by the Administrative Law Judge, where a discovery closing date has been set, discovery must be completed before said date. Discovery requested before the closing date, but not scheduled for completion before that date, does not comply with this Order.

III. *SETTLEMENT.* The parties are directed to conduct a thorough exploration of settlement possibilities before preparation of the pre-hearing memorandum described below. Should the parties wish the Administrative Law Judge to participate in a settlement conference, counsel may ask the Administrative Law Judge or the clerk to schedule such a conference. Counsel shall come to any such conference prepared to discuss settlement possibilities with *full authority* to enter into compromise agreements without the necessity of obtaining confirmation from clients. Counsel shall notify the Administrative Law Judge promptly in conference call of any settlement prior to hearing.

IV. *PREPARATION OF PRE-HEARING MEMORANDUM.* The parties are directed to confer *in person*, face to face, if possible, to exchange information, documents, and other materials which are expected to be relied upon at hearing and are necessary for preparation of the pre-hearing memorandum. Counsel for Complainant has primary responsibility to prepare the initial draft of the pre-hearing memorandum and shall submit it to opposing counsel as early as possible for revision, but no less than one week prior to the date set for filing with the Administrative Law Judge. Full cooperation and assistance of all other counsel are required. Each party has the affirmative duty of inquiry if the opposing party fails to comply in a timely or

appropriate manner to any responsibility imposed by this order. Section 710(b) of the Commission's Rules, 56 Ill. Admin. Code ch. XI, §5300.710(b) authorizes sanctions for failure or refusal to cooperate with preparation of this pre-hearing memorandum.

V. *PRE-HEARING MEMORANDUM FORM*. On or before NOVEMBER 13, 1990, the parties shall file with the Administrative Law Judge, a joint memorandum of the following information, signed by counsel for each party:

(a) The name, address, and telephone number of counsel for each party.

(b) *Material facts*. A comprehensive statement of all contested and uncontested material facts relating to liability, in consecutive numbered paragraphs, which will become a part of the evidentiary record in this case. Where the parties stipulate to the truth but not to the materiality of a given fact, the pre-hearing memorandum should so indicate.

(c) A statement of the contested and uncontested issues of law relating to liability.

(d) *Damages*. Information required in paragraphs (b) and (c) relating to the damages suffered by Complainant, and relief to which Complainant is entitled, in the event of a determination in Complainant's favor on issues of liability.

(e) A stipulation of the maximum potential relief to which Complainant is entitled in the event of a determination in Complainant's favor on issues of liability.

(f) *Exhibits*. A listing of all exhibits which may be offered by either party. All exhibits shall be marked for identification prior to hearing and exchanged with opposing counsel. The parties are directed to stipulate to the

authenticity of exhibits wherever possible. Exhibits whose admissibility is uncontested shall be so noted. Where there is an objection to admissibility, the pre-hearing memorandum shall state the objection and the offeror's grounds for admission of the exhibit. Copies of any contested exhibit shall be attached to the pre-hearing memorandum. Absent good cause for the omission, exhibits not listed in the pre-hearing memorandum will not be admitted at public hearing.

(g) *Witnesses*. A statement of the number of witnesses each party proposes to call and an estimate of the time required for examination and cross examination of the witness.

(h) A list of the name(s) of any expert witnesses to be called and statement of the subject matter to which each will testify. The parties shall stipulate to the qualifications of each expert or indicate in the pre-hearing memorandum the reasons for failure to so stipulate.

(i) A stipulation of the estimated number of days required for hearing and description of any scheduling problems, including a statement of any reasons why, if the hearing is not completed in the time allotted, the hearing may not continue from day to day until completed.

(j) A certification that the parties have discussed settlement within the week prior to filing of the pre-hearing memorandum, a statement whether further negotiations are ongoing and likely to be productive, and an indication whether the parties desire the participation or assistance of an Administrative Law Judge for possible conciliation.

(k) The signature of counsel for each party, indicating their approval of the pre-hearing memorandum as to form and substance.

All of which is ordered on September 27, 1990.

HUMAN RIGHTS COMMISSION

BY: /s/ Patricia A. Patton
PATRICIA A. PATTON
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

STATE OF ILLINOIS
Department of Human Rights
State of Illinois Center
100 West Randolph Street - Suite 5-100
Chicago, Illinois 60601
(312) 814-6269

James R. Thompson
Governor

September 27, 1990

Helen J. Bybee
R.R. #3 Box V 81
Chillicothe, IL 61523

Re: *Bybee v. Proctor Community Hospital, Charge No. 1989SA0554, EEOC No. 21B892334, ALS No. 4670*

Dear Ms. Bybee:

In the process of reviewing the file in this matter, I noticed that you are not represented by a lawyer. Although there is not requirement that you hire an attorney in order to have a hearing, I strongly advise that you do so if at all possible. If the respondent has legal counsel, you will be at a tremendous disadvantage as long as you remain unrepresented. For this reason, I want to give you every opportunity to find a lawyer if you wish to do so.

It is vital that you start your search immediately. While I want to give you the opportunity to be represented, I do not believe that it would be fair to the respondent to continue the hearing for this purpose where you have not been diligent. Furthermore, the sooner an attorney becomes involved in your case, the better he/she can represent you.

I shall expect that you will inform me and the respondent of your intentions in this regard within the next 15 days.

Yours truly

/s/ Patricia A. Patton
Patricia A. Patton
Administrative Law Judge
Administrative Law Section

cc: Roy G. Davis
PAP/sr

OCT 3 1994
OFFICE OF THE CLERK

No. 94-361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HELEN BYBEE,

Petitioner,

v.

PROCTOR HOSPITAL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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September 28, 1994

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the District Court or the Court of Appeals misapplied *St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S.Ct. 2742 (1993).
2. Whether the Court of Appeals erred in affirming the factual findings of the District Court.
3. Whether the Petitioner has misconstrued the decisions of the District Court and the Court of Appeals so as to create issues where none exist.

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IN THE

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OCTOBER TERM, 1994

HELEN BYBEE,

Petitioner,

v.

PROCTOR HOSPITAL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S[1] BRIEF IN OPPOSITION

REASONS WHY THE CAUSE SHOULD NOT BE HEARD BY THIS COURT

"A petition for writ of certiorari will be granted only when there are special and important reasons therefor." Supreme Court Rule 10. There are no special and important reasons for granting certiorari in this case. There is no split among the circuit courts of appeal as to any issue raised in this case. The decision of the Seventh Circuit does not conflict in any way with any decision of this Court nor does it de-

---

[1] The parent corporation of Proctor Hospital is Proctor Health Care Incorporated. Its subsidiaries which are not wholly owned are Health Plus, Inc., Galena Park Nursing Home, and Galena Park Terrace.

part, or sanction a departure, from the accepted and usual course of judicial proceedings. This case does not involve an important question of federal law that has yet to be addressed by this Court. In short, this case does not merit further review.

STATEMENT OF THE CASE

The Petitioner's Statement of the case is inaccurate and argumentative. The Respondent addresses the inaccuracies in that portion of its argument which responds to the Petitioner's various claims that the District Court's factual findings are erroneous.

The decisions of the District Court and the Court of Appeals contain factual statements of the case with which the Respondent agrees.

SUMMARY OF ARGUMENT

The primary argument made by the Petitioner is that the District Court did not reach the factual conclusions she wanted based on the evidence that was presented. Contrary to her claims, the District Court did not exclude any evidence from the record and its decision was based on the entire record. Moreover, the Court of Appeals review of the District Court's findings of fact was conducted on the basis of the record in its entirety. While the Court of Appeals found that there was some evidence to support Petitioner's position, the appellate judges had "no definite and firm conviction that a mistake has been committed" in the factual findings. No issue raised by the Petitioner on this point is worthy of review by this Court.

The legal issues posed by the Petition would make for an interesting academic exercise. However, they are not presented for the Court's consideration on the record in this case.

Petitioner raises the "pretext plus" issue which is the subject of several current commentaries. Following this Court's decision in *St. Mary's Honor Center v. Hicks*, some commentators have speculated that a plaintiff must, in addition to proving the employer's nondiscriminatory explanation is a lie, offer direct evidence of discrimination. Petitioner claims she was victimized by the application of "pretext plus". The difficulty with her position is that the Court of Appeals squarely stated that it did not hold her to that standard. Consequently, her argument is merely academic.

Petitioner makes a similar abstract argument about the standard employed by the Court of Appeals to measure the sufficiency of the nondiscriminatory reason advanced by the Respondent in support of its actions. The Court of Appeals repeated the maxim that it is not the job of the federal courts to delve into the wisdom of the employer's personnel policies and practices. Petitioner, claiming there is a split in the circuits, cites to two courts of appeal decisions reversing district court holdings that the ADEA is not applicable to religious institutions. In each instance the district court was motivated to dismiss due to the fear of government entanglement with religion that would arguably arise from the factual consideration of whether an employer's proffered religious reason for a negative employment action was pretextual. In reversing, the appellate courts did not direct the district court to examine the plausibility or wisdom of the employer's proffered religious motive as the Petitioner contends. Rather, the direction on remand in each case was simply to determine whether the employer's stated purpose for the challenged action was its actual purpose. This is precisely the standard employed below and it is consistent with every decision of this Court on the same point.

In summary, the Petition should be denied.

ARGUMENT

I.

The Petitioner failed to adduce sufficient evidence to persuade the District Court that the Respondent's decision to move her to the third shift was a pretext for age discrimination.

While the Petitioner attempts to cast the issues she raises in this case as questions of law, her primary complaint is that the District Court found her evidence of pretext insufficient. She claims the District Court and Court of Appeals "completely ignored" the "unrebutted evidence." There was no unrebutted evidence of pretext. The District Court accurately disposed of her arguments when it held:

> "Her case is based on her perception without proof."

Her perceptions are set forth again in her Petition and represented to be unrebutted evidence of pretext. In each and every instance she is wrong.

A. The absence of a corporate seniority policy is not evidence of pretext.

Petitioner's supervisor selected her to move to the third shift because, from among the candidates, she had the shortest length of service with the Hospital. Petitioner argues that her supervisor's decision to use length of service with the Hospital as the selection criteria is a pretext for age discrimination. However, the courts recognize that seniority preferences based on total length of service with the employer, in contrast to departmental seniority, generally favor the older worker. See *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1162 (7th Cir. 1992). Total length of service with an employer, as a general rule, is a predictor of age.

Petitioner is correct when she says there was no corporate seniority policy. This is because the Hospital operates on a "decentralized management" philosophy. Subject to very few corporate policies, the Patient Care Coordinator for each unit within the Hospital is free to establish policies, including those relating to seniority and shift selection, which will yield the best patient care. The Hospital's Chief Executive Officer explained this style of management succinctly (R 37):

> Q. Did the hospital have a particular philosophy or management style with respect to the delegation of authority to its managers for decision-making?
>
> A. It is our policy to have management decisions made at the lowest level of management within the organization, usually at the department head level.
>
> Q. If the department head determines that she is going to move nurses based on hospital seniority, does that require your approval before she does that?
>
> A. No.

Under examination by Petitioner's attorney, the Hospital's Chief Operating Officer further explained (R 54):

> Q. And concerning decentralized management, that means that each nursing unit operates as an individual unit self-contained, is that correct?
>
> A. There could be variations on interpretation of that. "Self contained" meaning?
>
> Q. Well, they're responsible for the staffing of their units?
>
> A. Uh-huh, right.
>
> Q. And determining who works where?
>
> A. Right.

Q. And whether a person works on third shift or first shift?

A. Right.

Q. And how many people we need at first, second and third shift?

A. Right.

Q. And as far as the policy of determining who works where, whether the person works third shift or first shift, that is within the unit?

A. Right.

No witness offered any testimony contrary to the foregoing. It is undisputed that Susan Gulley, the Patient Care Co-ordinator for the unit where Petitioner worked, had total discretion in assigning shifts. The absence of a corporate seniority policy governing the assignment of shifts is not evidence of age bias nor is it suspicious on its face. In short, it is not evidence of pretext.

B. Gulley's proposal to rearrange her staff is not evidence of pretext.

Prior to the staffing change giving rise to this action, Gulley's unit generally had 3 RNs, 2 LPNs and a nurse aide on the day shift (7 AM - 3 PM). There were 3 RNs and no LPNs on the night shift (11 PM - 7 AM). (R 265-274) In Gulley's view, this mix of RNs and LPNs was out of balance because there were two LPNs on days and none on nights. The imbalance adversely impacted the work performed on the unit in two ways.

The first adverse impact has to do with the protocol for assigning nurses to patients. Because each patient requires a certain amount of care that only an RN can perform, RNs must also assume duties for patients otherwise cared for by an LPN. In practice, the Patient Care Coordinator divides

all of the patients between her nurses (RNs and LPNs) and then assigns RNs to patients who are cared for by an LPN. Thus, an RN must care for her patients and assume certain duties for the LPNs' assigned patients. The imbalance identified by Gulley was that the three RNs on the day shift had to cover their patient load as well as that of the two LPNs. By contrast, there were no LPNs on third shift and the three RNs had no LPNs to supervise or assist. (R 272-277)

The second adverse impact had to do with the decision of the Hospital and its physicians to begin scheduling a greater number of "same day" surgeries. Those are procedures conducted on the same day as admission. (While the petitioner criticizes the Hospital for not introducing documentary evidence of the increase of same-day admissions, the Hospital was under no obligation to do so. Gulley, as well as the Hospital Vice President of Nursing, testified that there was an increase in the number of same-day admissions due to third party payors seeking to reduce their medical costs. (R 263; McCoy 20)) In order to handle these same-day surgeries, the Hospital had to admit the patients very early, frequently before the 7 AM starting time of the day shift. (R 263-264) Because the patient was not in the Hospital the previous evening and night, a substantial amount of nursing work had to be done before the patient was sent to surgery. When the patient is first admitted, a portion of the nursing care is typically that for which an LPN is well suited and which does not require the attention of an RN. The patient must be placed in a room, acclimated to surroundings and have certain vital signs (such as temperature and blood pressure) recorded. This is commonly referred to as "hands on" nursing which an LPN can perform competently and efficiently. The principal job of the RN as it relates to the admission of same-day surgeries is to prepare the overall assessment and "patient care plan".

This is a function which the LPN cannot perform. (R 273) All of this work must be performed on the day of surgery before the patient can be sent to the operating room whereas it used to be performed on the day before surgery. Consequently, the surgical schedule is pushed back in the day. As a result, the patients return from surgery later in the day. Thus, the evening shift (3 pm - 11 pm) assumes greater responsibility for the post-operative care of same-day surgeries, and the increase in same-day surgeries proportionately increases the evening shift's workload. (R 264)

In order to correct the problems which she perceived in staffing, Gulley proposed to increase the number of evening shift nurses, and to switch one of the day shift LPNs to the night shift in exchange for a night shift RN. There is nothing pretextual about Gulley's decision to address her staffing problem.

C. The decision to utilize length of service with the Hospital as the method for selecting the transferee was not pretextual.

As explained above, the Hospital had no corporate seniority policy. When neither the Petitioner nor the other LPN on the day shift volunteered to move to the night shift, Gulley decided that she would utilize seniority to decide which one would make the move. In determining which type of seniority to use, she sought the counsel of the Vice President of Nursing. The Vice President of Nursing suggested to her that it made the most sense to use length of service with the Hospital as the criteria. Her rationale was that the Hospital encourages its employees to progress upward through education and training (*i.e.* from aide to LPN to RN) and also encourages employees to transfer voluntarily from unit to unit to fill vacancies which is a great convenience to the Hospital. To apply job or unit seniority

would, logically and consistent with this rationale, serve as a disincentive to this type of activity. In other words, employees would not progress from aide to LPN nor would they voluntarily move from an overstaffed unit to an understaffed one if they knew they would be adversely affected by a seniority rule based on time in the unit or time in a particular job. Gulley also conferred with the Hospital's Vice President of Personnel who agreed with this position. Gulley adopted their advice and told Petitioner that length of service with the Hospital would control. (McCoy 26-30; R 74-75, 107, 281)

There is nothing pretextual about Gulley's selection of length of service with the Hospital as the determinative factor in deciding who would move to the third shift.

D. The Petitioner produced no evidence suggesting that a contrary seniority practice had been followed consistently in the past.

Petitioner claims that on a prior occasion, some time in the early 1970's, she was allowed to claim a night shift opening on another floor through the use of unit seniority. According to Petitioner, her supervisor explained the seniority principle as follows:

> "Well, I guess you will have to be able to take it [the open position] because you have more seniority on the floor."

In addition to being remote in time, her evidence is equivocal at best.

Petitioner also adduced testimony that in another instance, length of Hospital service was invoked by a Patient Care Coordinator to resolve conflicting shift requests. (R 208-218) In short, she failed in her attempt to demonstrate that the use of Hospital service to compel her to

move to third shift was aberrational. She demonstrated merely that there was no uniform past practice. In other words, the testimony she produced is absolutely consistent with the Hospital's system of decentralized management which allows each Patient Care Coordinator to adopt the policies and practices which will produce the best patient care for the particular unit.

E. Petitioner failed to prove age bias on the part of Gulley.

In an attempt to prove that Gulley was biased against older people, Petitioner produced Gulley's predecessor, Shirley Suits, to testify. When Suits was removed from the Patient Care Coordinator position and replaced by Gulley, Suits sought to remain employed as a nurse on the unit. She admitted that having spent so many years in management, her clinical nursing skills were rusty and she would need to be reoriented. Specifically, Suits admitted that she did not know how to use the intravenous pumps or the feeding tube pumps that were used on the floor. (R 307) Suits alleges that when she asked Gulley whether or not Gulley would be willing to assist her, Gulley told her that she did not want to be her "crutch". (R 309) Contrary to any opinion Suits may have about the comment, it does not denote age bias. At best, it indicates that Gulley was unwilling to have Suits lean on her to supplement her lack of clinical skills. Additionally, Suits' testimony is not direct evidence of age discrimination. Stray remarks and statements unrelated to the decisional process itself do not constitute direct evidence. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 109 S.Ct. 1775, 1804-5 (1989) (O'Connor, J., concurring in the judgment). In short, the incident to which Suits testified, even if entirely true, is neither direct evidence of discrimination nor sufficient to prove the Hospital's

reason for transferring Petitioner to the third shift was a mere pretext for age discrimination.

F. Gulley's inability to achieve her plan exactly as she had outlined it is not evidence of pretext.

When Petitioner refused to go to the open position on the night shift, Gulley sought an LPN to fill the opening. Her search for an LPN was unsuccessful. In the meantime, one of the registered nurses hired by Gulley to work on the evening shift proved unable to function adequately as a registered nurse on the unit. During her period of introductory employment, she simply failed to function as was expected. Since the Hospital had invested a significant amount of money in this individual by putting her through training peculiar to the floor, Gulley decided to move her to the vacant LPN position on the night shift where she was able to function, and to hire another RN to fill the vacancy on the evening shift. (R 287-288) Gulley's inability to achieve precisely what she set out to do (switch a day shift LPN for a night shift RN) is not evidence of pretext. The registered nurse who was moved to the LPN vacancy on the third shift was not capable of performing as expected as a registered nurse but could do the functions required to fill the opening created when Petitioner refused to transfer to the night shift. Moreover, it made economic sense to attempt to salvage the RN in some position which she could perform since the Hospital had invested a great deal of money in her training. In short, there is nothing about this particular matter which would demonstrate pretext.

1. Review of a factual finding is no basis to grant the writ.

Petitioner's only real basis for an appeal is her disagreement with the Court of Appeal's conclusion that the District

Court's finding of no discrimination was not clearly erroneous. The Court of Appeals considered *all* the evidence of record, and noted in its opinion that some evidence supported Petitioner's claim of discrimination. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511 (1985) (review of factual findings is to be made on basis of record in its entirety). However, the Court of Appeals found that the District Court's conclusion had a reasonable basis in the record. The appellate judges specifically found that they had no "definite and firm conviction that a mistake has been committed" in the factual findings. As is apparent from the foregoing, the Court of Appeals committed no error in this review process, and no issue is presented by the Petitioner on this point worthy of a grant of certiorari review.

Petitioner argues briefly that the Court of Appeals should have remanded the case to the District Court for more elaborate factfinding under the authority of *United States Postal Bd. of Governors v. Aikens*, 460 U.S. 711, 717, 103 S.Ct. 1478, 1484 (1983). Petitioner has a poor grasp on the appropriate standards of review at issue. In *Aikens*, the district court granted summary judgment in favor of the employer based only on its conclusion that the plaintiff had failed to establish a prima facie case. *See Aikens v. U.S. Postal Bd. of Governors*, 642 F.2d 514 (D.C. Cir. 1980), *vacated* 435 U.S. 902, 101 S.Ct. 3135 (1981), *on remand*, 665 F.2d 1057, (D.C. Cir. 1981), *vacated*, 460 U.S. 711, 103 S.Ct. 1478 (1983). The district court never issued any finding on the ultimate question of discrimination, and this Court correctly took both the district court and the court of appeals to task for this failure to focus on the ultimate question. The reason why a remand was necessary in *Aikens* was because there was *no finding* below on this central issue. *Cf. St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S.Ct. 2742, 2749 n.4 (1993) (although rejection of the employer's prof-

fered reason is sufficient to support a finding of discrimination, there must be an affirmative finding on this point to enable appellate review). By contrast, the District Court here most clearly found as a matter of fact that Respondent did not discriminate against Petitioner. A full and complete record was available to the Court of Appeals to review this finding, which it did. No remand is necessary or appropriate.

After receiving all of the evidence, including Petitioner's asserted direct evidence of discrimination, the District Court found that the Respondent did not discriminate against the Petitioner on account of her age. The Petition for Writ of Certiorari, in the final analysis, amounts to nothing more than a refined plea for this Court to review the factual findings made below. There is no basis for granting the writ.

II.

No evidence was excluded from consideration by either the District Court or the Court of Appeals.

Petitioner argues that the Court of Appeals wrongfully excluded evidence relating to the Petitioner's prima facie case when considering whether she met her ultimate burden of proving age discrimination. This assertion is flawed for at least two reasons. First, and most simply, neither the Court of Appeals nor the District Court excluded any evidence whatsoever.[2] Indeed, the parties agreed to withhold

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[2] Petitioner's argument that the District Court excluded evidence is based on a hypertechnical dissection of the language in the District Court's findings of facts. The Court of Appeals properly read those findings in a common sense manner, and reviewed them in light of the record as a whole. This was the proper role for the

(continued...)

objections to the admission of evidence based on the fact that this was a bench trial, and in confidence that the magistrate judge could weigh the admitted evidence appropriately without the need for the limiting restrictions typically found in jury trials. The Court of Appeals obviously considered all the Petitioner's evidence, including that relating to her prima facie case, as shown by the following portion of the Court of Appeal's decision:

> Nor is there merit to [Petitioner's] related argument that the court erroneously found that she failed to make out a prima facie case. It is clear (and Proctor admits) that Bybee did make out a prima facie case of discrimination. It is also clear that Proctor articulated a nondiscriminatory justification for its decision: Bybee had the least hospital-wide seniority. The question therefore boiled down to whether the nondiscriminatory reason was pretext, that Bybee was *actually* forced to transfer because the hospital was discriminating against her on the basis of her age. Again, the court made a factual determination that it was not. Bybee's only recourse on appeal therefore is to take issue with this factual finding. And she does.

Order at A-15 (emphasis in original). Petitioner's argument that her prima facie case evidence was not considered in deciding the ultimate issue is not based in reality.

Second, neither this Court nor any court of appeals has ever held, as Petitioner suggests, that evidence supporting a prima facie case is sufficient in and of itself to establish that a proffered non-discriminatory explanation is a pretext for actual discrimination. For the past twenty years, all

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[2] (...continued)
Court of Appeals, even if the language of the District Court was technically imprecise. *See Amadeo v. Zant*, 486 U.S. 214, 228, 108 S.Ct. 1771, 1780 (1988).

courts have understood and followed this Court's simple directive regarding the allocation of burdens of proof in employment discrimination cases:

1. The plaintiff must establish a prima facie case by the preponderance of evidence to survive a directed verdict.
2. The defendant then bears a burden of production only to assert a legitimate, non-discriminatory basis for its employment decision.
3. The burden then shifts to the plaintiff to establish again by a preponderance of the evidence that this asserted reason is a pretext for an actual discriminatory reason for the action.

As this Court explained in the recent *Hicks* case, evidence relating to the prima facie case may permit a trier of fact to infer discrimination *only* when coupled with evidence sufficient to establish by a preponderance that the employer's asserted reason for its employment decision is false. Even then, the circumstantial prima facie case evidence coupled with the evidence of falseness does not *mandate* judgment for the plaintiff. It only presents a dispute for the trier of fact on the ultimate issue of discrimination *vel non*. Petitioner here is attempting to argue that her prima facie case evidence, irrespective of any evidence establishing the falseness of Respondent's asserted reason, or any other evidence of record, mandates judgment in her favor. This is a patently meritless argument, without any support whatsoever. It does not justify the exercise of review by certiorari.

III.

This case does not present for the Court's consideration the issue of "pretext plus".

Petitioner makes a fictitious argument that the Court of Appeals wrongfully required her to present direct evidence

of discrimination. Again, the Court of Appeal's specifically addressed this issue and laid the Petitioner's contention to rest.

> [T]he law acknowledges that it would be very difficult for an employee to put forward direct evidence of her employer's discrimination to be drawn where an ostensibly non-employment decision is shown to be pretextual. The last stage of the *McDonnell-Douglas* analysis thus requires the plaintiff to prove pretext.
>
> A frequently arising question under this analysis is what happens if an employer comes forward with a non-discriminatory justification for its decision, and it turns out that explanation is a lie. The Court in *Hicks* said that proving that the employer is lying is not necessarily enough for the plaintiff to prevail. The factfinder is entitled to infer from the fact that the employer is lying—though it need not—that the actual reason for the decision is discriminatory. . . . It is true that there is some suggestion in *Hicks* that additional evidence of discrimination may be necessary before the factfinder can conclude that the actual reason was discrimination, but in *Anderson* we concluded that this language was dicta, and we therefore ignored it. *Anderson [v. Baxter Healthcare Corp.]*, 13 F.2d [1120,] 1124 n.3 [(7th Cir. 1994)].

Order at A-14. The Court of Appeals clearly did not fault the Petitioner for failing to present evidence of discrimination beyond her attempt to demonstrate pretext. Thus, Petitioner has no legal argument to make on this point. Even if the Courts of Appeals are split over the issue of whether direct evidence is required to prove discrimination, or over the proper interpretation of *St. Mary's Honor Center v. Hicks* (points which Petitioner has not truly demonstrated in her Petition), *the Court of Appeals in this case ruled in Petitioner's favor on this point of law*. Accordingly, this

record in this case does not present for decision the issue which the Petitioner wants the Court to resolve.

IV.

The Court of Appeals applied the proper legal standard for determining the sufficiency of the legitimate business reason advanced by the Respondent to explain its actions.

Finally, the Petitioner attempts to present a "sub-issue" involving the Court of Appeals' standard for establishing pretext. However, the cases cited by Petitioner do not reveal any conflicts between the Courts of Appeals on this issue, and the Seventh Circuit in this case appropriately followed the decisions of this Court in addressing the issue. Accordingly, Petitioner again has failed to present any issue justifying, much less compelling, a grant of the writ of certiorari.

Petitioner argues that the Court of Appeals held that any explanation set forth by an employer mandates judgment in its favor in the absence of direct evidence of discrimination. The Seventh Circuit said no such thing. What the court actually stated was:

> [Respondent] argues that the choice of what type of seniority system to use is a business decision that is not subject to second guessing by the courts. Br. at 20.
>
> This claim overstates its case. If Proctor used hospital-wide seniority, rather than nursing-wide or unit-wide seniority, in order to disadvantage Bybee—and did so on account of Bybee's age—it would have violated ADEA and would be liable for damages. But the hospital is correct in saying that federal law otherwise does not prevent it from adopting whatever type of seniority system it wants. Its decision can be based on legitimate business reasons, on the quirks of its managers, or on the align-

> ment of the stars. But it cannot be a smokescreen for an attempt to discriminate on the basis of age. The ultimate point in this case is that the finder of fact determined that the policy choice represented a legitimate business decision, and was not pretext to disguise discriminatory motivation.

Order at A-16. This analysis is completely consistent with this Court's directives to the courts of appeals dating back to *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576-78, 98 S.Ct. 2943, 2949-50 (1978). In *Furnco*, this Court held that the federal anti-discrimination statutes do not require an employer to use policies that maximize the interests of persons in the protected classes. The statutes only forbid employers from intentionally treating such persons worse than other persons because of their protected status.

> The dangers of embarking on a course such as that charted by the Court of Appeals here, where the court requires businesses to adopt what it perceives to be the "best" hiring procedures, are nowhere more evident than in the record of this very case. Not only does the record not reveal that the court's suggested hiring procedure would work satisfactorily, but also there is nothing in the record to indicate that it would be any less "haphazard, arbitrary, and subjective" than Furnco's method, which the Court of Appeals criticized as deficient for exactly those reasons. Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.
>
> This is not to say, of course, that proof of a justification which is reasonably related to the achievement of some legitimate goal necessarily ends this inquiry. The plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination. . . . But the Court of Appeals . . . did not conclude that the prac-

> tices were a pretext for discrimination, but only that different practices would have enabled the employer to at least consider, and perhaps to hire, more minority employees. But courts may not impose such a remedy on an employer at least until a violation of Title VII has been proved, and here none had been under the reasoning of either the District Court or the Court of Appeals.

438 U.S. at 578, 98 S.Ct. at 2950. The Court of Appeals analysis in this case is manifestly faithful to this Court's directives in *Furnco*.

Petitioner nonetheless pleads for certiorari on the grounds that the circuits are split over the proper analysis involved in an employee's attempt to show a proffered business reason for the employment action to be pretext. Petitioner points to two opinions which it contends are in conflict with the Court of Appeals decision below, *Geary v. Visitation of the Blessed Virgin Mary Parish School*, 7 F.3d 324 (3d Cir. 1993) and *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993). However, the holdings of these cases are not in conflict with the decision below. In both *Geary* and *DeMarco* the plaintiffs sued religious institutions, claiming age discrimination under the ADEA. The district court in both cases held that the ADEA could not be applied at all to the religious defendants because of the potential for excessive governmental entanglement with religion in contravention of the First Amendment's Establishment Clause. In each case, the court of appeals reversed, specifically because the plaintiffs *could* attempt to establish that the defendants' asserted reasons (even asserted religious reasons) were pretextual *without* showing that the reasons were unwise or implausible (*i.e.*, without calling into question the validity of the employer's religious tenets). For instance, in *Geary*, 7 F.3d at 331-32, the Third Circuit stated:

> Any challenge to the validity or "plausibility" of the religious reason would of course do damage to the protection afforded Visitation School by the First Amendment . . . but Geary might have demonstrated, for example, that similarly [situated] persons had not been fired, that she did not in fact [possess the characteristics on the basis of which defendant claimed it fired her], or that Visitation School's explanation did not emerge until late in the litigation.

Similarly, the Second Circuit stated in *DeMarco*, 4 F.3d 170-71 (citations omitted):

> [I]n applying the *McDonnell Douglas* test to determine whether an employer's putative purpose is a pretext, a fact-finder need not, and indeed should not, evaluate whether a defendant's stated purpose is unwise or unreasonable. Rather, the inquiry is directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related action . . . The pretext inquiry thus normally focuses upon factual questions such as whether the asserted reason for the challenged action comports with the defendant's policies and rules, whether the rule applied to the plaintiff has been applied uniformly, and whether the putative non-discriminatory purpose was stated only after the allegation of discrimination.

These statements are consistent with *Furnco* and with the analysis of the Seventh Circuit in the case below.

Following the quoted passage, the Second Circuit in *DeMarco* did state, "However, in an ADEA or Title VII case, a plaintiff may be able to put into question the genuineness of the employer's putative non-discriminatory purpose by arguing that the stated purpose is implausible, absurd or unwise." *Id.* Although this language is inconsistent with the Seventh Circuit's analysis in this case, it does not constitute

a "circuit split." The Second Circuit did not hold that plaintiff DeMarco had so established pretext, and accordingly, the language in the opinion is mere dicta. Petitioner points to no appellate court opinion upholding a judgment of liability and a finding of pretext on the basis of "implausibility."

In addition to the fact that it is dicta and is focussed on a problem not presented in the case at hand (the potential conflict between the ADEA and the First Amendment in an application to a religious organization as employer), the *DeMarco* language cited above is contrary to this Court's case law. The Second Circuit cited to *Hazen Paper Co. v. Biggins*, ___ U.S. ___, 113 S.Ct. 1701, 1708 (1993) in support of its "implausibility" proposition. However, in *Biggins* this Court actually stated, "[I]nferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where unsavory motives, such as pension interference, were present. This issue is now before us in the Title VII context, see *Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (CA8 1992), cert. granted, 506 U.S. ___, 113 S.Ct. 954, 122 L.Ed.2d 111 (1993), and we will not address it prematurely." *Biggins*, 113 S.Ct. at 1708. *Hicks*, on the other hand, contains absolutely no language supporting Petitioner's contention that she should be able to establish pretext by showing that Respondent's seniority policy was "implausible" or "unwise." *Hicks* casts no doubt on the continuing viability of *Furnco*. Rather, *Hicks* repeats the essential basis of a showing of pretext as *falsity* (not "poor judgment," "implausibility," or "anything less preferable to older persons or to the particular plaintiff than is possible under any stretch of the imagination") coupled with, or generating a permissible inference of, actually discriminatory motivation.

In short, the Court of Appeals certainly did not take the absurd position that Petitioner tries to paint in its Petition, that any proffered explanation mandates judgment absent direct evidence of discrimination. The Court of Appeals' opinion below recognized that plaintiff had the opportunity at trial to establish pretext under the proper analysis focusing on truthfulness and discrimination. That analysis is perfectly consistent with the precedent of this Court and with the holdings of the other courts of appeals. Pointing to erroneous dicta in another court's opinion does not constitute a conflict among the circuits sufficient to justify the commitment of this Court's resources on certiorari review.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

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